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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 762

HOMER LESTER BARTCHY, ALIAS HOMER BROOKS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 24, 1943.

CERTIORARI GRANTED APRIL 12, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 732

HOMER LESTER BARTCHY, ALIAS HOMER BROOKS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 21, 1943.

[fols. 1-13]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Cr. No. 8275

UNITED STATES OF AMERICA, Plaintiff,

versus

HOMER LESTER BARTCHY, alias HOMER BROOKS, Defendant

Douglas W. McGregor, U. S. Attorney, and W. R. Eckhardt, Assistant U. S. Attorney, of Houston, Texas; for Plaintiff.

Bernard A. Golding, Houston, Texas; for Defendant.

MEMORANDUM OF THE COURT—Filed 18 day of April, 1942

The Defendant is charged by Indictment under the Selective Training and Service Act of 1940 (Sections 301 to 318, Title 50, U. S. C. A.), and particularly Section 11 thereof:

First Count: With failure to report for induction into the Armed Forces of the United States under the provisions of such Act when ordered by his Local Draft Board so to do.

Second Court: With failure to keep his Local Draft Board advised at all times of the address where mail would reach him as required by Regulation Part 641.3.

[fol. 14] The case has been tried before the Court without a jury, and is disposed of as follows:

1. Defendant's Demurrer to the Indictment is not meritorious, and is over-ruled. The authorities sustaining the Act are found in United States v. Herling, 120 Fed. (2d) 236.

2. It is undisputed that on or about February 4, 1942, Defendant, who had theretofore duly registered, answered his questionnaire, and been placed in Class 1-A, successfully passed his physical examination, was advised by the Draft Board that he would be inducted into the Army within 20 or 30 days, and was on February 20, 1942, or-

dered to report to the Draft Board on March 4, 1942, for induction. He did not report.

Defendant says that the proceedings of the Draft Board subsequent to his failure to report were irregular. In some respects, they were not in accordance with the Regulations, but that is not a bar to Defendant's prosecution under the Inductment.

Defendant, however, is found not guilty under Count One of the Indictment for the reason that the evidence is not sufficient to support a finding that he had either notice or knowledge of the Order of the Draft Board directing him to report.

3. But I find Defendant guilty under Count Two of the Indictment. Notwithstanding the fact that, as stated, he stood his physical examination on or about February 4, 1942, and was advised that he would be inducted within 20 or 30 days, he shipped out of Texas City February 11, 1942, as a seaman on a ship bound for New York City. He arrived in New York City February 20, 1942, and on or about February 25, 1942, filed an application to ship as a seaman on a foreign voyage to the "Far East" on the Steamship American Packard. He went aboard such Steamship, and remained thereon in New York Harbor, working, [fol. 15] eating, and sleeping thereon until March 11, 1942, when he received word through the Maritime Union that his Draft Board and the F. B. I. were seeking him. He surrendered, and was returned to Houston. The first address Defendant gave his Draft Board was 7428 Sherman Street, Houston, which was his place of residence. About February 4, 1942, he changed this address to 7543 Harrisburg Boulevard, which was his then place of business. Before leaving Houston on February 11, 1942, he wrote a letter, dated February 10, 1942, to the Draft Board, seeking deferment on the ground that he wished to become a seaman, and in that letter, asked the Draft Board to address reply to, and he gave his address as, 8045 Harrisburg Boulevard, Houston, which was the Houston office of the National Maritime Union. The letter advised that he would ship out as seaman on the Steamship Caliche, and later, on February 10, 1942, he sent a telegram to the Draft Board, advising that he would change to the Steamship Pan Maine. He in fact shipped out on the Steamship Pan Rhode Island, arriving in New York on that ship as stated. When he left

Houston, He left instructions with the Maritime Union to send any communications for him from the Draft Board to the Maritime Union Office in New York City, or to in some way communicate with him.

The Draft Board's notice for him to appear for induction into the Service apparently was sent to 7543 Harrisburg Boulevard, but in some way found its way into the hands of the National Maritime Union, at Houston, and was sent to the office of such Union in New York City, and then, because it was the information there that Defendant had shipped out on the Steamship American Packard for a foreign voyage, it was returned to Houston. He did not receive it.

Defendant sent no communication to the Draft Board, and the Draft Board had no communication from him from [fols. 16-234] February 11, 1942, to March 11, 1942, although, as stated, he was from February 25, 1942, to March 11, 1942, on the Steamship American Packard in New York Harbor awaiting the time for him to ship out on a foreign voyage.

The Act and Regulations thereunder require great diligence and promptness upon the part of Registrants in complying with the Act, Regulations, and Orders of the Board, and particularly great diligence in keeping the Draft Board advised of his whereabouts as required by Regulation Part 641.3. Defendant has not shown such diligence, but on the contrary, has sought to avoid his duty in that respect.

The Clerk will file this Memorandum and make it a part of the Record in this case.

T. M. Kennerly, Judge.

[fol. 235] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10333

HOMER LESTER BARTCHY, ALIAS HOMER BROOKS, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Southern District of Texas

OPINION OF THE COURT AND DISSENTING OPINION OF HUTCHESON, CIRCUIT JUDGE—Filed December 23, 1942

Before Hutcheson, Holmes, and McCord, Circuit Judges

HOLMES, Circuit Judge:

Appellant, a registrant under the Selective Training & Service Act of 1940, was found guilty of knowingly failing to keep his local draft board advised at all times of the address where mail would reach him, in violation of Section 11 of the Act.[1] The only decisive question is whether there was [fol. 236] substantial evidence to support the finding of the court below, the case having been tried without a jury.

These are the determinative facts, as to which there is no dispute: Prior to February 4, 1942, appellant had been placed in Class 1A by his local draft board, and had passed his pre-induction physical examination. On or about that date he was advised by the board that he probably would be inducted within twenty-five or thirty days. On February 10, 1942, appellant wrote to his local board and stated that he was that day shipping as a seaman aboard a named merchant vessel; that he would return within two weeks; and that he could be reached by mail addressed in care of the National Maritime Union in Houston, Texas. He did not ship aboard the vessel named, giving as his reason therefor the belated discovery that the ship was to take a three-month voyage, and that he could not be absent from Houston more than twenty days in view of his draft status. The following day he shipped aboard another merchant vessel, bound

[1] 50 U. S. C. A., Sec. 311.

for New York; and the Union was advised to forward his mail to the offices of the Union in New York City. Prior to this voyage appellant had never worked as a seaman, but he claimed occupational deferment as a seaman in the merchant marine in his letter of February 10, 1942, to the local board.

Upon his arrival in New York on February 20, 1942, appellant called at the Union offices, but no mail had yet arrived for him. He signed off the vessel on which he had come, and did not attempt to secure passage on any other returning to Houston; but, on February 25th, he shipped aboard a vessel being repaired in Hoboken, N. J., for a foreign voyage. He remained aboard this ship from February 25, 1942, until March 11, 1942, during which time he did not communicate in any way with the Union offices in New York or with his draft board. He testified that it was [fol. 237] his intention, in the event he received no communication from his draft board prior to the sailing time of the vessel, to ship on the voyage in foreign commerce from which he would not return for several months. Meanwhile, on February 20, 1942, the draft board mailed to appellant a notice to report for induction on March 4, 1942. This notice was forwarded to the offices of the Maritime Union in New York, but was returned unopened to the draft board with a letter advising that appellant had sailed upon a foreign voyage prior to the arrival of the notice. The local board notified the Federal Bureau of Investigation of appellant's delinquency, and he was taken into custody in New York on March 11, 1942, shortly before the vessel on which he had signed was scheduled to begin its foreign voyage.

Article 641.3 of the selective service regulations, promulgated under Section 10 of the Selective Training & Service Act of 1940, places an affirmative duty upon every registrant under the Act to keep his local draft board advised at all times of the address where mail will reach him. The finding of the court below that appellant failed in the discharge of this duty is supported by substantial evidence. Moreover, appellant's conduct in shipping aboard a vessel bound in foreign commerce, with the acknowledged intent to absent himself from the United States for a period of several months if he received no communication from his draft board before the sailing date, and his failure to contact the Union or the local board at any time during the crucial two-weeks period when his notice of induction was due, supports

the inference that he not only failed to do what was required of him to effectuate the communication of notice but also affirmatively endeavored to avoid delivery of the communication.

The judgment is Affirmed.

[fol. 238] HUTCHESON, Circuit Judge, Dissenting:

Appellant, a registrant under the Selective Training and Service Act of 1940 was prosecuted under an indictment in two counts. The first charged that, called to report and submit himself for induction into the armed forces of the United States on March 4, 1942, and therefore under a duty so to do, he, in violation of the Selective Training and Service Act, Sec. 311, Title 50, U. S. C. A., failed and neglected to perform the duty so required of him. The second charged that the defendant was registered with local draft board No. 9, that in accordance with the provisions of the Selective Training and Service Act of 1940 and the rules and regulations prescribed thereunder, it was his duty to keep the draft board advised at all times of the address where mail would reach him, and that, in violation of that duty, he knowingly, willfully and feloniously did fail and neglect to keep the local draft board so advised. Defendant demurred to the indictment and each count thereof. The demurrers overruled, he pleaded not guilty and, upon his request with the approval of the court and the United States Attorney, a jury was waived and all questions of fact as well as of law were submitted to the court. At the conclusion of the trial there was a verdict and finding of not guilty of, failure to report for induction as charged in count one of the indictment and of guilty of, failure to keep the draft board advised of the address where mail would reach him as charged in count two. This appeal followed a judgment and sentence of sixty days on that count. Appellant is here insisting that his demurrer to count two of the indictment was well taken and that that count should have been dismissed. He makes the further insistence that, the evidence,[1] with-

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[1] These are the undisputed facts as the record discloses them: Defendant was registered with Local Draft Board No. 9 in Houston, Texas. When he registered he gave his address as 7428 Sherman Street, Houston, Texas. He completed his selective service questionnaire, was given a pre-

[fol. 239] out conflict, every fact testified to consistent with every other fact, no witness disputing the testimony of any other, the facts thus disclosed are wholly insufficient to [fol. 240] establish beyond a reasonable doubt that appellant failed to keep his local draft board advised at all times

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liminary physical examination, and was, on January 20, 1942, classified 1-A by the Board. On February 3, 1942, Appellant was given any Army physical examination. At the time of this physical examination the address which the Board had for the registrant was 7543 Harrisburg Boulevard, Houston, Texas. On about February 4, 1942, the Appellant came to the office of the Local Board and asked how much time he would have before induction. He was advised that he would be inducted in about twenty-five or thirty days. On February 10, 1942, Appellant advised the Board by letter that he was shipping as a seaman aboard the steamship Caliche, and gave his address as the National Maritime Union, 8045 Harrisburg Boulevard, Houston, Texas:

"Tuesday, Feb. 10, 1942.

Selective Service Board No. 9, 504 Hermann Bldg., Houston, Texas.

DEAR SIRS:

In accordance with your regulations, I am notifying you that I have today shipped as a seaman aboard The S. S. Caliche. I have asked the Company and the office of the National Maritime Union 8045 Harrisburg Blvd. to also notify you.

I do not want you to in any way believe that I am seeking to safeguard my life from service on behalf of our countries fight against Hitlerism. On the contrary I am told that because of recent sinkings the casualty list among Merchant Seamen is as high or higher than in any other section of Service.

However, I prefer service in the Merchant Marine to any other branch of service because of the dependent which I have acquired recently—too recently to be recognized by your board—and since the Maritime Commission and the Federal Government have appealed for young men to join the Merchant Marine to replace those being sunk and to man the new ships being built I have volunteered for this branch of our countries defense effort.

of the address where mail would reach him. I think it clear beyond any possibility of doubt both that the second count of the indictment states no offense and that if it does, the evidence fails to establish its commission. The government, the district judge, and the majority, considering only

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In the event that you do not consider my service as an active seaman deferable you may communicate with me at my new mailing address 8045 Harrisburg Blvd., care National Maritime Union. The trip I am shipping on will not last more than two weeks, and since I have not received from you yet either the final report on my physical examination, or an order giving me the date of induction, and since I was told by your board that I would have from 25 to 30 days after my physical examination (most probably), I believe that in the event you decide to induct me into the army that I shall be back in Houston before the effective date of induction.

Please send your decision to me at 8045 Harrisburg Blvd., Houston.

Sincerely Yours, Homer L. Bartchy, Homer Lester Bartchy, 8045 Harrisburg Blvd., Order No. 2671.11."

On the same date Appellant advised the Board by telegram that he was sailing on the steamship Pan-Maine. On February 11, 1942, the Appellant actually sailed aboard the steamship Pan-Rhode Island, arriving in New York on February 20, 1942. There he went to the New York office of the N. M. U. and reported to James Merrell, the person in charge for N. M. U. of placing and keeping up with men furnished by it for signing on merchant vessels. Explain-[fol. 240] ing his situation fully and telling Merrell that he expected to hear from his draft board by a communication forwarded from the N. M. U. office in Houston to the N. M. U. office in New York, and charging Merrell to send it at once to him, defendant on February 25, in New York signed on the steamship American Packard for a foreign voyage, expecting to be notified if called by the Board. He remained on board this vessel continuously from Feb. 25, 1942, until March 11, 1942, awaiting its departure, as it was being delayed by repairs and other things, and he was required to be there and ready at all times. Before he left Houston he explained the whole thing to the agent for the

the first sentence of the regulation, "It shall be the duty of each Registrant to keep his Local Board advised at all times of the address where mail will reach him", and failing to consider it as a whole, fell into the error of completely misapprehending its meaning and effect, and, therefore, of assuming that the regulation imposed the duty of keeping the Board advised from day to day of Registrant's whereabouts and that the failure to do so constituted an offense. The reading of the regulation as a whole in the light of the [fol. 241] Selective Service Act, its provision and purpose, makes quite clear that the regulation had one purpose and effect and one only. That purpose and effect was to advise the registrant that the Board would rely in sending out its communications upon the address last given and if he did not want it to continue to use that address, he should advise it of any change. It had neither the purpose nor the

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N. M. U., whose office he had given as his address there and asked that all communications be forwarded. On February 20, 1942, an order to report for induction was mailed by the Local Board directing the Appellant to report on March 4, 1942. This order was mailed not to the address last given but to 7543 Harrisburg Boulevard. This order found its way to the National Maritime Union office at 8045 Harrisburg Blvd., Houston, Texas, and was forwarded to the National Maritime Union office at New York, where it was received by James F. Merrell, and returned by him to the Local Board. Communicated with by the Board, after they had received the return of their induction order, Merrell explained the situation fully to them, pointed out the great necessity for men on merchant ships and urged the Board to defer defendant until he could make the trip he had undertaken. Without following the regulations which require the board to carefully consider whether a person registered is a willful or unintentional violator, the Board proceeded to turn the matter over to the District Attorney for prosecution, and the prosecution was immediately instituted. When advised that the Board considered defendant delinquent, Merrell made further inquiry, found that defendant's ship had not sailed, notified him that the F. B. I. wanted him on a charge in Houston, and defendant came in and surrendered.

effect of making it an offense for the registrant to stick to his original address. This is the regulation in whole:

"641.3 Communication by mail. It shall be the duty of each Registrant to keep his local Board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

What it intends to, and does, accomplish, is this: when the registrant gives his address at time of registration, he must expect that address to serve as the one for the Board to communicate with him by, and if he doesn't notify the Board of a change of address, he must expect to be bound by notices sent to that address whether he receives them or not, and to abide the consequences of their sending though they were not received. Thus the regulation puts the responsibility for his failure to actually receive notices upon the registrant and not upon the board, and it instructs him that if he wants to be sure that he will actually and not merely constructively receive notices, he must keep the board advised of changes of address. At the same time, it tells him that his last reported address will be a sufficient address for all the purposes of the Board and that the mailing of any order or communication to the last address given by him shall constitute notice to him and lay him liable for prose-
[fol. 242] cution for failure to obey it whether or not he actually receives the notice. If in this case the board had mailed his notice of induction to the last address he gave, he would have been without defense to the first count for, constructively presumed to have received his notice, he was under the imperative duty to report for induction at the time named in it, and he did not report. He was, however, acquitted on this count, and we do not have to give it further consideration. The charge made against him under the second count that he did not keep the board advised of an address where mails could reach him states no offense at all. For the regulation invoked expressly provided that the Board will always mail to his last address given, and that he will be conclusively presumed to have received notices sent by the Board to that address. Any failure, therefore, to keep the Board advised of a change of address is not a failure of duty for which he can be indicted as a criminal,

it is merely a failure of self protection as a result of which he may find himself subject to indictment as a criminal for failure to obey an order or communication, notice of which he did not actually receive. The demurrer should have been sustained and this count of the indictment should have been dismissed as charging no offense. If, however, I am wrong in this, I think it crystal clear that the government completely failed to show not only beyond a reasonable doubt but by the preponderance of the evidence that defendant willfully and knowingly violated his duty to keep his local board advised of an address where mail would reach him. In the first place he selected the address of the union which he had joined and which keeps close tab on all its members. In the second place he left explicit directions to forward mail to him in care of the N. M. U. in New York. When he got to New York he left the same specific directions with the agent of the N. M. U. and to deliver to him any notices received from the board, and if the agent of the N. M. U. in New York had done what he had been told to do, defend-[fol. 243] ant would have received the notice. It got there while defendant was still in New York and it was not delivered to him, not because of his failure in choosing an address, but because of the fault of the agent of the union in returning the letter to Houston. It just cannot be held that the address he gave was not an address by which mail would reach him when the proof showed that, had the careful directions he gave been carried out, he would have gotten the mail, and that he was actually contacted through that address. I realize that if the evidence supports the conviction, the fact that to fill a crying need for men he was entering upon a most dangerous service for his country would not save him. But the service he was offering to do and the crying need he was filling, according to the undisputed testimony of Merrell, along with the balance of the evidence furnishes the guide by which to determine whether he was willfully evading a duty or was doing the best he could to keep the board informed of his address while serving his country.

"And here is the place to pay a tribute to our Merchant Marine. Officially this is not one of our fighting forces, but I doubt if there is a more dangerous service. The merchant seaman risks bombs, torpedoes, mines, machine gunning, in addition to the usual perils of the sea, and often faces death

in a form more terrible than any known on a battle field. He wears no fancy uniform, no bands play for him, or nobody calls him a hero—I heard of one man who had been torpedoed six times—yet back they go over and over again to their ship." [2]

In my opinion, the prosecution and conviction by which this defendant, while voluntarily serving his country on a most dangerous mission, was stigmatized, sentenced to jail, and in effect marked as a fugitive from duty, was wholly unwarranted and unjust. The judgment of conviction should [fols. 244-256] be reversed and the indictment dismissed. I dissent from the affirmance of the judgment.

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[2] Britain at War, J. B. Priestley, Harper & Bro.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 762

HOMER LESTER BARTCHY, ALIAS HOMER BROOKS,
Petitioner,

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit,

AND BRIEF IN SUPPORT THEREOF

BERNARD A. GOLDING,
Counsel for Petitioner

ALPHA LAW BRIEF CO., HOUSTON

SUBJECT INDEX

LIST OF AUTHORITIES

CASES

CONSTITUTION OF THE UNITED STATES

UNITED STATES CODE

JUDICIAL CODE

IN THE

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OCTOBER TERM, 1942

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HOMER LESTER BARTCHY, ALIAS HOMER BROOKS,
Petitioner,

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

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THE MATTER INVOLVED

Summary of the Matter Involved

The matter involved is the correctness of a decision of the Circuit Court of Appeals, in a criminal case, holding that Petitioner, a seaman in the service of the American Merchant Marine, was properly convicted for failure to report to his local draft board for induction.

Petitioner's defense was, and, still is, that the local Draft Board was properly advised, by letter, of his permanent ad-

dress, prior to the time notice of induction was mailed him; that the Draft Board in disregard of his notice of his permanent address sent him such induction order to a prior address given by him, as a consequence of which he never received the notice to report for induction. Further, the local Draft Board and other authorities continued this prosecution notwithstanding the fact that within the 15 days provided for in the regulations properly enacted by the Selective Service Board, Petitioner presented himself for induction in order that he may stand purged of any alleged delinquency.

Statement

For brevity's sake, and since we cannot more succinctly state the facts upon which Petitioner was indicted and ultimately convicted, we ask liberty to quote the *undisputed* facts, as set forth in the dissenting opinion of MR. JUSTICE HUTCHESON:

> "These are the undisputed facts as the record discloses them: Defendant was registered with Local Draft Board No. 9 in Houston, Texas. When he registered he gave his address as 7428 Sherman Street, Houston, Texas. He completed his selective service questionnaire, was given a preliminary physical examination, and was, on January 20, 1942, classified 1-A by the Board. On February 3, 1942, Appellant was given an Army physical examination. At the time of his physical examination the address which the Board had for the registrant was 7543 Harrisburg Boulevard, Houston, Texas. On about February 4, 1942, the Appellant came to the office of the Local Board and asked how much time he would have before induction. He was advised that he would be inducted in about twenty-five or thirty days. On February 10, 1942, Appellant advised the Board by letter that he was shipping as a seaman aboard the steamship Caliche, and gave his address as the National Maritime Union, 8045 Harrisburg Boulevard, Houston, Texas:

"Tuesday, Feb. 10, 1942.

Selective Service Board No. 9,
504 Hermann Bldg.,
Houston, Texas.

Dear Sirs:

In accordance with your regulations, I am notifying you that I have today shipped as a seaman aboard The S.S. Caliche. I have asked the Company and the office of the National Maritime Union, 8045 Harrisburg Blvd., to also notify you.

I do not want you to in any way believe that I am seeking to safeguard my life from service on behalf of our countries fight against Hitlerism. On the contrary I am told that because of recent sinkings the casualty list among Merchant Seamen is as high or higher than in any other section of Service.

However, I prefer service in the Merchant Marine to any other branch of service because of the dependent which I have acquired recently—too recently to be recognized by your board—and since the Maritime Commission and the Federal Government have appealed for young men to join the Merchant Marine to replace those being sunk and to man the new ships being built I have volunteered for this branch of our countries defense effort.

In the event that you do not consider my service as an active seaman deferable you may communicate with me at my new mailing address 8045 Harrisburg Blvd., care National Maritime Union. The trip I am shipping on will not last more than two weeks, and since I have not received from you yet either the final report on my physical examination, or an order giving me the date of induction, and since I was told by your board that I would have from 25 to 30 days after my physical examination (most probably), I believe that in the event you decide to induct me into the army that I shall

be back in Houston before the effective date of induction.

Please send your decision to me at 8045 Harrisburg Blvd., Houston.

Sincerely yours,

HOMER L. BARTCHY,
HOMER LESTER BARTCHY,
8045 Harrisburg Blvd.,
Order No. 2671.11."

On the same date Appellant advised the Board by telegram that he was sailing on the steamship Pan-Main. On February 11, 1942, the Appellant actually sailed aboard the steamship Pan-Rhode, Island arriving in New York on February 20, 1942. There he went to the New York office of the N. M. U. and reported to James Merrell, the person in charge for N. M. U. of placing and keeping up with men furnished by it for signing on merchant vessels. Explaining his situation fully and telling Merrell that he expected to hear from his draft board by a communication forwarded from the N. M. U. office in Houston to the N. M. U. office in New York, and charging Merrell to send it at once to him, defendant on February 25, in New York signed on the steamship American Packard for a foreign voyage, expecting to be notified if called by the Board. He remained on board this vessel continuously from Feb. 25, 1942, until March 11, 1942, awaiting its departure, as it was being delayed by repairs and other things, and he was required to be there and ready at all times. Before he left Houston he explained the whole thing to the agent for the N. M. U., whose office he had given as his address there and asked that all communications be forwarded. On February 20, 1942, an order to report for induction was mailed by the Local Board directing the Appellant to report on March 4, 1942. This order was mailed not to the address last given but to 7543 Harrisburg Boulevard. This order found its way to the National Maritime Union office at 8045 Harrisburg Blvd., Houston, Texas, and was forwarded to the National Maritime Union office at New

> York, where it was received by James F. Merrell, and returned by him to the Local Board. Communicated with by the Board, after they had received the return of their induction order, Merrell explained the situation fully to them, pointed out the great necessity for men on merchant ships and urged the Board to defer defendant until he could make the trip he had undertaken. Without following the regulations which require the board to carefully consider whether a person registered is a willful or unintentional violator, the Board proceeded to turn the matter over to the District Attorney for prosecution, and the prosecution was immediately instituted. When advised that the Board considered defendant delinquent, Merrell made further inquiry, found that defendant's ship had not sailed, notified him that the F. B. I. wanted him on a charge in Houston, and defendant came in and surrendered" (R. 238-244).

Upon these facts Petitioner was indicted: (a) With failure to report for induction into the Armed Forces of the United States, under the provisions of "The Selective Training & Service Act of 1940;" (b) With failure to keep his Draft Board informed *at all times* of the address where mail would reach him as required by Regulation 641.3 (R. 4-6).

The trial court found Petitioner "not guilty" under the First Count of the indictment *because the indictment was insufficient to support a finding that Petitioner had notice or knowledge of the order of the Draft Board to report.*

The trial court found Petitioner "guilty" under the Second Court (R. 14-16).

Petitioner was sentenced to sixty days in prison, to be designated by Attorney General on Count Two of said indictment (R. 12).

The Circuit Court of Appeals affirmed, MR. JUSTICE HUTCHESON dissenting (R. 235-244).

Jurisdiction

The judgment of the Circuit Court of Appeals, MR. JUSTICE HUTCHESON dissenting, was entered on December 23rd, 1942 (R. 235-244).

A petition for rehearing was denied, Mr. JUSTICE HUTCHESON dissenting, on January 26, 1943 (R. 252).

The jurisdiction of this Court rests upon Section 240(a) of the JUDICIAL CODE, as amended by the Act of February 13th, 1925, being Title 28, Section 347(a), U.S. Code.

Questions Presented

Whether a conviction for an alleged violation of a regulation of the Selective Training & Service Act shall be permitted to stand when:

1. A seaman in the service of the American Merchant Marine admittedly notified, by letter, his local draft board advising it of his last change of permanent address and the Draft Board in disregard of such written notice—received prior to his call for induction—forwards notice of induction to an improper address which was never received by such seaman;

2. A seaman in the service of the American Merchant Marine having given his local Draft Board his permanent address in compliance with the very regulation of which he was convicted; the Draft Board having sent notice of induction to an improper address and was therefore never received by him;

3. A seaman in the service of the American Merchant Marine when learning of his alleged delinquency presents himself for induction within the fifteen-day period, as provided by law, yet was denied the right provided in such regulation to purge himself of any delinquency;

4. By the action of those in authority, Petitioner was refused the right to purge himself of an alleged delinquency within the fifteen-day period provided for by law;

5. All of the evidence was without dispute that Petitioner kept his local Draft Board advised of the address where mail would reach him, and the Draft Board failed to mail his induction orders to the address given by Petitioner.

6. The indictment itself charged no violation of the laws, and was so indefinite and uncertain as not to inform Petitioner of the charge against him;

7. The evidence was as consistent with innocence as with guilt; and

8. The circumstantial evidence did not exclude every reasonable hypothesis of innocence.

Statute and Regulations Involved

U. S. C., Title 50, Sec. 311;
Selective Training and Service Act of 1940, Regulations 641.3; 642.1-642.5.

They appear in the Appendix, page 17, et seq.

Reasons Relied on for the Allowance of the Writ

1. The question involved in this case is one of Federal Law, which has not been, but should be, settled by this Court. A large majority of the population of the United States is subject to the provisions of the Selective Training & Service Act of 1940, and the majority decision of the Circuit Court of Appeals, if permitted to stand, leaves in confusion the proper application of certain Draft Regulations (641.3; 642.1-642.5), and a decision by this Court seems necessary to enable Draft Boards to properly administer

the Regulations promulgated under said Act, and to provide a rule of conduct for all citizens subject to the Act.

2. Because the case involves a question of gravity and general importance which it is in the public interest to have decided by the Court of last resort. The question involved is far reaching in its application and importance. The decision of the Circuit Court of Appeals affects many thousands of American youths, who are amenable to the Draft Laws.

3. A review of the decision of the Court below is of importance in the administration of the Selective Training & Service Act of 1940.

4. Because of the importance in the administration of justice of the problem raised.

Prayer

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and the proceedings of the Circuit Court of Appeals had in the case numbered and entitled on its docket 10333, HOMER LESTER BARTCHY, ALIAS HOMER BROOKS, *Appellant*, v. UNITED STATES OF AMERICA, *Appellee*, to the end that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such further relief as this Court may deem proper.

BERNARD A. GOLDING,
Counsel for Petitioner

Dated February 20th, 1943.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.....

HOMER LESTER BARTCHY, ALIAS HOMER BROOKS,
Petitioner,

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court below

The opinion of the court below, the United States Circuit Court of Appeals for the Fifth Circuit, has not been reported at the time of the preparation of this brief, but this opinion is dated December 23, 1942, and is attached to this brief as an exhibit. It appears in the Record on pages 235-244.

Statement of the Case

This has already been stated in the preceding Petition (on

pages 2-5) which is here adopted and made a part of this brief.

Specifications of Error

THE CIRCUIT COURT OF APPEALS ERRED:

1. In holding that Petitioner failed to advise his Local Draft Board where mail would reach him.

2. In holding that the acts and conduct of the Local Draft Board, and those in authority, did not deprive Petitioner of the benefit of the presumption of innocence and the right to purge himself of any delinquency.

3. In holding that Petitioner was negligent in keeping his Local Draft Board advised of the address where mail would reach him.

4. In overruling a demurrer attacking the validity of the indictment in both counts.

5. In failing to hold that the indictment was insufficient in law because it is vague, indefinite, and fails to charge a violation of law which may properly be made the basis of an offense.

6. In failing to hold that the evidence in this case demonstrated beyond a reasonable doubt Petitioner's "guilt" under the second count of this indictment.

7. In failing to hold that the second count in said indictment failed to state facts sufficiently to show that Petitioner had violated the regulation (641.3) in question and that he was "guilty" of the offense sought to be charged in said count.

8. In failing to hold that Petitioner did not avoid a duty in keeping advised the Local Draft Board of his address where mail would reach him.

Summary of Argument

1) PETITIONER ADVISED DRAFT BOARD OF ADDRESS WHERE MAIL WOULD REACH HIM

The indisputable evidence in this case shows that Petitioner notified the Draft Board, in writing, of his permanent mailing address, and where mail would reach him, prior to the mailing by the Draft Board of its "notice of induction;" that the Draft Board mailed both the "notice of induction" and "notice of suspected delinquency" to the wrong address, hence, were never received by Petitioner, and he had no notice whatsoever of these "notices."

2) PETITIONER WAS DEPRIVED OF THE RIGHT, GRANTED UNDER THE LAW, TO PURGE HIMSELF OF "ALLEGED DELINQUENCY"

The evidence clearly shows that Petitioner, when he learned of "notices" having been issued by the Local Draft Board, *but mailed to the wrong address,* Petitioner immediately reported and sought, opportunity to "purge" himself of delinquency.

3) INSUFFICIENT INDICTMENT

The indictment charges no crime under the Federal laws. It fails to inform Petitioner "of the nature and cause of the accusation," against him (CONST., Art. VI) or to sufficiently define the charge in the second count so as to enable him subsequently to avail himself, upon a further prosecution for the same cause, of his right to immunity from double jeopardy (CONST., Art. V).

4) PROOF IS INSUFFICIENT

The evidence in the record clearly shows that Petitioner never received any notices or Reports to report for "In-

duction," or as to alleged "delinquency," the absence of which leaves no room for doubt that the conviction on the second count is not sustained.

5) Conviction on Second Count Is Not Sustained by Competent Proof Beyond a Reasonable Doubt

The trial court held in its memorandum opinion (R. 14), that Petitioner "had neither notice or knowledge of the order of the Draft Board directing him to report;" that being so, the conviction is not justified since the proof did not exclude every reasonable hypothesis of innocence.

6) Utter Lack of Evidence

The evidence in the record fails utterly to show that Petitioner avoided any duty connected with his Registration, or that he had any knowledge of the mailing of any Report or Notice by the Board, at any time. There was no evidence of any kind, either direct or indirect, that Petitioner was aware of his induction by his Draft Board. The proof offered shows that the Local Draft Board completely ignored Petitioner's communication advising the Board of his "change of address," and flagrant violations of the Board's Regulations tantamount to unjust discrimination. No shred of evidence indicates "guilt" by Petitioner. At most, his political beliefs were contrary to those generally accepted. There is not even a showing that, in any specific instance, Petitioner was in any respect remiss in his obligation. The record wholly fails to sustain the conviction.

Argument

Petitioner, by letter, notified his Local Draft Board on February 10th, 1942, that his permanent address was 8045 Harrisburg Blvd. On February 20, 1942, his Local Draft Board mailed a "notice of induction" to 7543 Harrisburg

Blvd., Houston, Texas, directing him to report on March 4, 1942. This notice was returned to the Draft Board, "undelivered." On March 9, 1942, the Draft Board mailed a "notice of suspected delinquency," which likewise did not reach Petitioner, directing him to communicate with it on March 15, 1942.

When Petitioner learned of such notices, he surrendered to the authorities on March 11, 1942. He then sought an opportunity to "purge" himself but was denied this privileg , notwithstanding the provisions of Selective Training and Service Act Regulations (641.2-642.5).

Such notice having been sent to an address other than that designated by this Petitioner, could not satisfy the requirements of the Selective Training and Service Act, hence, such notice not only lacked legal effect, but could not have the effect of bringing the Petitioner into the Military Service. This issue has been resolved in the case of ALLEN v. TIMM, ET AL. (C.C.A. 7th), 1 F. (2d) 155, 157:

> "Pelican Rapids was not Appellant's 'last known address.' He never received mail there, nor sent mail from there. His father did not tell the mail man that that was appellant's address; on the contrary, he said the address was Page, N. D. There was no justification for ignoring the address given in the registration card. Appellant gave that as his address and was entitled to have notice sent there until changed by him.
>
> Respondent's answer relied, and the government here relies, solely upon the sufficiency of the notice sent to Pelican Rapids. It did not satisfy the requirements of the Selective Service Regulations. All notices should have been sent to the address given, and they would have been effective, whether received or not. We are of opinion that the evidence is insufficient to show that appellant was ever inducted into the military service."

Having received no notices to report for Military Service,

Petitioner could not be declared a "delinquent," nor a violator of the Selective Training and Service Act. U. S. v. WHEELER, 65 L. Ed. 270; FARLEY v. RATLIFF (C.C.A. 4th), 267 F. 682; EX PARTE GOLDSTEIN, 268 F. 431.

The right to "purge," granted all registrants under the cited Regulations, is but a segment of Democratic Civil Liberties. And, "Civil Liberties are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference." (MR. JUSTICE DOUGLAS in U. S. v. CLASSIC, 61 S. Ct. 1045-1046.) The circumstances in the instant case did not give the Draft Board power to cause Registrant to be summarily arrested, indicted and sentenced, and the right to "purge" himself denied, hence, the judgment rendered in this cause finds no rational basis. (MR. JUSTICE STONE in U. S. v. CAROLENE PRODUCTS Co., 304 U.S. 144, 152 N.)

The holding of the Circuit Court of Appeals (majority decision), is a serious departure from established principles, on issues of Reasonable Doubt and Insufficiency of Evidence.

> " * * * probability is not a guide which a court, in construing a penal statute, can safely take." It is one thing to allow wide and generous scope to the express and implied powers of Congress; it is distinctly another to read into the vague and general language of an act of Congress specifications of crimes. We should ever be mindful that "before a man can be punished, his case must be plainly and unmistakably within the statute, "United States v. Lacher, 134 U.S. 624, 628, 10 S. Ct. 625, 626, 33 L. Ed. 1080. It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated and then to particularize it as a crime because it is highly offensive. Cf. James v. Bowman, 190 U.S. 127, 23 S. Ct. 678, 47 L. Ed. 979." (MR. JUSTICE DOUGLAS in U. S. v. CLASSIC, 61 S. Ct. 1045.)

Guilt is determined by a showing that a person has been so found "beyond a reasonable doubt." (MR. JUSTICE REED in WARSZOWER v. U. S., 61 S. Ct. 603, 606.) This attribute is entirely lacking in this conviction.

To reach the conclusion that the evidence, standing by itself, meets the requisite tests for conviction, would indeed be a departure from irrefutable principles of justice and, in their place, substitute a melancholy doctrine.

It is all too plain for argument that:

> "It is highly important, of course, that this and all other criminal laws should be strictly enforced, but it is of far greater importance that a citizen should not be imprisoned and deprived of his liberty under a judgment based on no surer foundation than mere guesswork and speculation. This rule is elementary. DeLuca v. U. S. (C.C.A.), 298 F. 412; DeVilla v. U. S. (C.C.A.), 294 F. 535; Turinetti v. U. S. (C.C.A.), 2 F. (2d) 15." (MR. JUSTICE RUDKIN in BENN v. U. S. (C.C.A. 9th), 21 Fed. (2d) 962.)

Not desiring to prolong this argument longer than absolutely necessary, we say, that the majority decision of the Circuit Court of Appeals, has positively, unequivocally, plainly and clearly held that a person amenable to the draft laws, although he receives no legal notice whatsoever of his induction, and the plain facts demonstrate that Petitioner is not culpable or remiss in his duty to serve his country, he may, nevertheless, be indicted, convicted, and thus have placed upon him the stamp of eternal criminality as a draft evader.

For his devotion to duty and observance of his obligation to aid his native land in this hour of terrible stress and strain, Petitioner has been subjected to the ignominy of indictment, trial and conviction, and the consequent stigma of draft evasion, in time of war.

Thus, this is a matter of wide importance in the adminis-

tration of the Selective Training and Service Act, and is a matter of national interest, in the sense that it affects the majority of the population of the United States, and an authoritative decision in the matter involved from this Most Honorable Court will go far toward producing that certainty in law and that uniformity in decision which is unquestionably desirable on a subject which, from its very nature, will necessarily arise continually until the present international struggle ceases.

For the reasons before stated, Petitioner earnestly urges that this Court grant its Writ of Certiorari directed to the Court of Civil Appeals for the Fifth Circuit and relieve this Petitioner from the unjust burden to which he is subjected by the terms of the judgment entered against him by said court.

Conclusion

It is respectfully submitted that the Writ of Certiorari prayed for in the Petition should issue.

Respectfully submitted,

BERNARD A. GOLDING,
Counsel for Petitioner

APPENDIX

U. S. C., TITLE 50, SEC. 311

Offenses and Punishment

Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval

law may be tried by court martial, and, on conviction shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act. Sept. 16, 1940, 3:08 P. M., E. S. T., c. 720, §11, 54 Stat. 894.

REGULATION 641.3

Communication by Mail. It shall be the duty of each Registrant to keep his local Board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not.

REGULATIONS 642.1-642.5

DELINQUENCY

642.1—*Mailing Notice of Delinquency.* (a) When a local board has reason to believe that a nonregistrant under its jurisdiction is a delinquent or that a registrant under its jurisdiction has become a delinquent, the board shall prepare, in quadruplicate, a Notice of Delinquency (Form 281).

(b) The local board shall mail the original of the Notice of Delinquency (Form 281) to the suspected delinquent at his last known address. It shall mail a copy to the State Director of Selective Service. It shall post a copy in a conspicuous place for public inspection, and, whenever practicable, it shall give the information contained thereon to the press and radio and shall encourage them to give such in-

formation the widest possible publicity. It shall file the fourth copy with the date of mailing noted thereon.

(c) If the suspected delinquent is a registrant under the jurisdiction of the local board, the local board shall note in the "Remarks" column of the Classification Record (Form 100) the fact that the notice was mailed and file the fourth copy of the Notice of Delinquency (Form 281) in the registrant's Cover Sheet (Form 53).

642.2—*Investigation of Delinquency.* (a) After mailing the Notice of Delinquency (Form 281), *the local board shall wait 5 days before taking further action.*

(b) If it does not hear from the suspected delinquent during the 5-day period, the local board shall take the following steps:

(1) Communicate with the person 'who will always know' the registrant's address whose name and address appear on the 'Registration Card' (Form 1).

(2) Communicate with the 'employer' whose name and address appear on the Registration Card (Form 1).

(c) If as a result of these contacts the local board acquires any information which will enable it, with a reasonable amount of effort, to locate the suspected delinquent, it should make that effort.

(d) In trying to locate the suspected delinquent the local board may use the voluntary assistance of local or State police officials, as well as the press and radio. In no event, however, will the local board order or participate in the arrest of a suspected delinquent.

642.3—*Disposition of Delinquencies. If a suspected delinquent has been located as a result of the local board's ef-*

forts under Section 642.2 or a suspected delinquent has reported voluntarily to a local board, the local board shall carefully investigate the delinquency. If the board finds that the suspected delinquent is innocent of any wrongful intent, the local board shall proceed to consider his case just as if he were never suspected of being a delinquent. The local board shall report its decision to the State Director of Selective Service and shall note its decision in its records.

642.4—*Reporting Delinquents to the United States District Attorney.* (a) If the local board is convinced that a delinquent is not innocent of wrongful intent or if it is unable to locate a suspected delinquent (see Sec. 642.2), the local board shall report him to a United States District Attorney for prosecution under Section 11 of the Selective Training and Service Act of 1940, as amended.

(b) In reporting a delinquent to a United States District Attorney, the local board shall fill out a Report of Delinquents to United States District Attorney (Form 279), in Quadruplicate. The local board shall mail the original to the United States District Attorney. It shall mail a copy to the State Director of Selective Service. It shall post a copy in a conspicuous place for public inspection, and whenever practicable, it shall give the information contained thereon to the press and radio and shall encourage them to give such information the widest possible publicity. It shall note the date of mailing on the fourth copy and shall place it in the registrant's Cover Sheet (Form 53), if the delinquent is a registrant, or in an alphabetical file of nonregistrant delinquents, if the delinquent is not a registrant.

(c) If the delinquent is a registrant, the local board shall note its action in the "Remarks" column of the Classification Record (Form 100).

642.5—*Local Board action subsequent to reporting a delinquent to United States District Attorney.* When a delinquent who has been reported to a United States District Attorney later offers to comply with the law, the United States District Attorney should be immediately notified and give a complete statement of the facts concerning such offer of compliance. The decision of whether such delinquent should be prosecuted or his prosecution continued, in case it has already been undertaken, rests entirely with the United States District Attorney. The local board, when requested to do so by the United States District Attorney, may offer a suggestion as to the advisability of discontinuing the prosecution of a delinquent who has complied or is willing to comply with the law. *If it is determined that the delinquency is not willful, or that substantial justice will result, the local board should encourage the delinquent to comply with his obligations under the law, and if he does so or offers to do so, should urge that any charge of delinquency against him or any prosecution of him for delinquency be dropped.*

EXHIBIT A

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 10333

HOMER LESTER BARTCHY, ALIAS HOMER BROOKS, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the District Court of the United States for the Southern District of Texas.

(December 23, 1942.)

BEFORE HUTCHESON, HOLMES AND MCCORD, Circuit Judges.

HOLMES, Circuit Judge: Appellant, a registrant under the Selective Training & Service Act of 1940, was found guilty of knowingly failing to keep his local draft board advised at all times of the address where mail would reach him, in violation of Section 11 of the Act.[1] The only decisive question is whether there was substantial evidence to support the finding of the court below, the case having been tried without a jury.

These are the determinative facts, as to which there is no dispute: Prior to February 4, 1942, appellant had been placed in Class 1A by his local draft board, and had passed his pre-induction physical examination. On or about that date he was advised by the board that he probably would be inducted

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[1] 50 U. S. C. A., Sec. 311.

within twenty-five or thirty days. On February 10, 1942, appellant wrote to his local board and stated that he was that day shipping as a seaman aboard a named merchant vessel; that he would return within two weeks; and that he could be reached by mail addressed in care of the National Maritime Union in Houston, Texas. He did not ship aboard the vessel named, giving as his reason therefor the belated discovery that the ship was to take a three-month voyage, and that he could not be absent from Houston more than twenty days in view of his draft status. The following day he shipped aboard another merchant vessel, bound for New York; and the Union was advised to forward his mail to the offices of the Union in New York City. Prior to this voyage appellant had never worked as a seaman, but he claimed occupational deferment as a seaman in the merchant marine in his letter of February 10, 1942, to the local board.

Upon his arrival in New York on February 20, 1942, appellant called at the Union offices, but no mail had yet arrived for him. He signed off the vessel on which he had come, and did not attempt to secure passage on any other returning to Houston; but, on February 25th, he shipped aboard a vessel being repaired in Hoboken, N. J., for a foreign voyage. He remained aboard this ship from February 25, 1942, until March 11, 1942, during which time he did not communicate in any way with the Union offices in New York or with his draft board. He testified that it was his intention, in the event he received no communication from his draft board prior to sailing time of the vessel, to ship on the voyage in foreign commerce from which he would not return for several months. Meanwhile, on February 20, 1942, the draft board mailed to appellant a notice to report for induction on March 4, 1942. This notice was forwarded to the offices of the Maritime Union in New York, but was returned unopened to the draft board with a letter advising that appellant had sailed upon a foreign voyage prior to the arrival of the notice. The

local board notified the Federal Bureau of Investigation of appellant's delinquency, and he was taken into custody in New York on March 11, 1942, shortly before the vessel on which he had signed was scheduled to begin its foreign voyage.

Article 641.3 of the selective service regulations, promulgated under Section 10 of the Selective Training & Service Act of 1940, places an affirmative duty upon every registrant under the Act to keep his local draft board advised at all times of the address where mail will reach him. The finding of the court below that appellant failed in the discharge of this duty is supported by substantial evidence. Moreover, appellant's conduct in shipping aboard a vessel bound in foreign commerce, with the acknowledged intent to absent himself from the United States for a period of several months if he received no communication from his draft board before the sailing date, and his failure to contact the Union or the local board at any time during the crucial two-weeks period when his notice of induction was due, supports the inference that he not only failed to do what was required of him to effectuate the communication of notice but also affirmatively endeavored to avoid delivery of the communication.

The judgment is

AFFIRMED.

HUTCHESON, Circuit Judge, Dissenting:

Appellant, a registrant under the Selective Training and Service Act of 1940 was prosecuted under an indictment in two counts. The first charged that, called to report and submit himself for induction into the armed forces of the United States on March 4, 1942, and therefore under a duty so to do, he, in violation of the Selective Training and Service Act, Sec. 311, Title 50, U. S. C. A., failed and neglected to perform the duty so required of him. The second charged that the defendant was registered with local draft board No. 9, that

in accordance with the provisions of the Selective Training and Service Act of 1940 and the rules and regulations prescribed thereunder, it was his duty to keep the draft board advised at all times of the address where mail would reach him, and that, in violation of that duty, he knowingly, willfully and feloniously did fail and neglect to keep the local draft board so advised. Defendant demurred to the indictment and each count thereof. The demurrers overruled, he pleaded not guilty and, upon his request with the approval of the court and the United States Attorney, a jury was waived and all questions of fact as well as of law were submitted to the court. At the conclusion of the trial there was a verdict and finding of not guilty of, failure to report for induction as charged in count one of the indictment and of guilty of, failure to keep the draft board advised of the address where mail would reach him as charged in count two. This appeal followed a judgment and sentence of sixty days on that count. Appellant is here insisting that his demurrer to count two of the indictment was well taken and that that count should have been dismissed. He makes the further insistence that, the evidence,[1] without conflict, every fact testified to consistent with every other fact, no witness disputing the testimony of any other, the facts thus disclosed are wholly insufficient to establish beyond a reasonable doubt that appellant failed to keep his local draft board advised at all times of the address where mail would reach him. I think it clear beyond any pos-

[1] These are the undisputed facts as the record discloses them: Defendant was registered with Local Draft Board No. 9 in Houston, Texas. When he registered he gave his address as 7428 Sherman Street, Houston, Texas. He completed his selective service questionnaire, was given a preliminary physical examination, and was, on January 20, 1942, classified 1-A by the Board. On February 3, 1942, Appellant was given an Army physical examination. At the time of this physical examination the address which the Board had for the registrant was 7543 Harrisburg Boulevard, Houston, Texas. On about February 4, 1942, the Appellant came to the office of the Local Board and asked how much time he would have before induction. He was advised that he would be inducted in about twenty-five or thirty days. On February 10, 1942, Appellant advised the Board by letter that he was shipping

sibility of doubt both that the second count of the indictment states no offense and that if it does, the evidence fails to establish its commission. The government, the district judge, and the majority, considering only the first sentence of the regulation, "It shall be the duty of each Registrant to keep his Local Board advised at all times of the address where mail will reach him," and failing to consider it as a whole, fell into the error of completely misapprehending its meaning and effect, and, therefore, of assuming that the regulation imposed the duty of keeping the Board advised from day to day of Registrant's whereabouts and that the failure to do so constituted an offense. The reading of the regulation as a

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as a seaman aboard the steamship Caliche, and gave his address as the National Maritime Union, 8045 Harrisburg Boulevard, Houston, Texas:

"Tuesday, February 10, 1942.

Selective Service Board No. 9,
504 Hermann Bldg.,
Houston, Texas.

Dear Sirs:

In accordance with your regulations, I am notifying you that I have today shipped as a seaman aboard The S. S. Caliche. I have asked the Company and the office of the National Maritime Union 8045 Harrisburg Blvd., to also notify you.

I do not want you to in any way believe that I am seeking to safeguard my life from service on behalf of our countries fight against Hitlerism. On the contrary I am told that because of recent sinkings the casualty list among Merchant Seamen is as high or higher than in any other section of Service.

However, I prefer service in the Merchant Marine to any other branch of service because of the dependent which I have acquired recently—too recently to be recognized by your board—and since the Maritime Commission and the Federal Government have appealed for young men to join the Merchant Marine to replace those being sunk and to man the new ships being built I have volunteered for this branch of our countries defense effort.

In the event that you do not consider my service as an active seaman deferable you may communicate with me at my new mailing address 8045 Harrisburg Blvd., care National Maritime Union. The trip I am shipping on will not last more than two weeks, and since I have not received from you yet either the final report on my physical examination, or an order giving me the date of induction, and since I was told by your

whole in the light of the Selective Service Act, its provision and purpose, makes quite clear that the regulation had one purpose and effect and one only. That purpose and effect was to advise the registrant that the Board would rely in sending out its communications upon the address last given and if he did not want it to continue to use that address, he should advise it of any change. It had neither the purpose nor the effect of making it an offense for the registrant to stick to his original address. This is the regulation in whole:

> "641.3 Communication by mail. It shall be the duty of each Registrant to keep his local Board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

What it intends to, and does, accomplish, is this: when the registrant gives his address at time of registration, he must

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board that I would have from 25 to 30 days after my physical examination (most probably), I believe that in the event you decide to induct me into the army that I shall be back in Houston before the effective date of induction.

Please send your decision to me at 8045 Harrisburg Blvd., Houston.

Sincerely Yours,

HOMER L. BARTCHY,
HOMER LESTER BARTCHY,
8045 Harrisburg Blvd.,
Order No. 2671.11."

On the same date Appellant advised the Board by telegram that he was sailing on the steamship Pan-Maine. On February 11, 1942, the Appellant actually sailed aboard the steamship Pan-Rhode Island, arriving in New York on February 20, 1942. There he went to the New York office of the N. M. U. and reported to James Merrell, the person in charge for N. M. U. of placing and keeping up with men furnished by it for signing on merchant vessels. Explaining his situation fully and telling Merrell that he expected to hear from his draft board by a communication forwarded from the N. M. U. office in Houston to

expect that address to serve as the one for the Board to communicate with him by, and if he doesn't notify the Board of a change of address, he must expect to be bound by notices sent to that address whether he receives them or not, and to abide the consequences of their sending though they were not received. Thus the regulation puts the responsibility for his failure to actually receive notices upon the registrant and not upon the board, and it instructs him that if he wants to be sure that he will actually and not merely constructively receive notices, he must keep the board advised of changes of address. At the same time, it tells him that his last reported address will be a sufficient address for all the purposes of the Board and that the mailing of any order or communication to the last address given by him shall constitute notice to him and lay him liable for prosecution for failure to obey it

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the N. M. U. office in New York, and charging Merrell to send it at once to him, defendant on February 25, in New York signed on the steamship American Packard for a foreign voyage, expecting to be notified if called by the Board. He remained on board this vessel continuously from February 25, 1942, until March 11, 1942, awaiting its departure, as it was being delayed by repairs and other things, and he was required to be there and ready at all times. Before he left Houston he explained the whole thing to the agent for the N. M. U., whose office he had given as his address there and asked that all communications be forwarded. On February 20, 1942, an order to report for induction was mailed by the Local Board directing the Appellant to report on March 4, 1942. This order was mailed not to the address last given but to 7543 Harrisburg Boulevard. This order found its way to the National Maritime Union office at 8045 Harrisburg Blvd., Houston, Texas, and was forwarded to the National Maritime Union office at New York, where it was received by James F. Merrell, and returned by him to the Local Board. Communicated with by the Board, after they had received the return of their induction order, Merrell explained the situation fully to them, pointed out the great necessity for men on merchant ships and urged the Board to defer defendant until he could make the trip he had undertaken. Without following the regulations which require the board to carefully consider whether a person registered is a willful or unintentional violator, the Board proceeded to turn the matter over to the District Attorney for prosecution, and the prosecution was immediately instituted. When advised that the Board considered defendant delinquent, Merrell made further inquiry, found that defendant's ship had not sailed, notified him that the F. B. I. wanted him on a charge in Houston, and defendant came in and surrendered.

whether or not he actually receives the notice. If in this case the board had mailed his notice of induction to the last address he gave, he would have been without defense to the first count for, constructively presumed to have received his notice, he was under the imperative duty to report for induction at the time named in it, and he did not report. He was, however, acquitted on this count, and we do not have to give it further consideration. The charge made against him under the second count that he did not keep the board advised of an address where mails could reach him states no offense at all. For the regulation invoked expressly provided that the Board will always mail to his last address given, and that he will be conclusively presumed to have received notices sent by the Board to that address. Any failure, therefore, to keep the Board advised of a change of address is not a failure of duty for which he can be indicted as a criminal, it is merely a failure of self protection as a result of which he may find himself subject to indictment as a criminal for failure to obey an order or communication, notice of which he did not actually receive. The demurrer should have been sustained and this count of the indictment should have been dismissed as charging no offense. If, however, I am wrong in this I think it crystal clear that the government completely failed to show not only beyond a reasonable doubt but by the preponderance of the evidence that defendant willfully and knowingly violated his duty to keep his local board advised of an address where mail would reach him. In the first place he selected the address of the union which he had joined and which keeps close tab on all its members. In the second place he left explicit directions to forward mail to him in care of the N. M. U. in New York. When he got to New York he left the same specific directions with the agent of the N. M. U. and to deliver to him any notices received from the board, and if the agent of the N. M. U. in New York had done what he had been told

to do, defendant would have received the notice. It got there while defendant was still in New York and it was not delivered to him, not because of his failure in choosing an address, but because of the fault of the agent of the union in returning the letter to Houston. It just cannot be held that the address he gave was not an address by which mail would reach him when the proof showed that, had the careful directions he gave been carried out, he would have gotten the mail, and that he was actually contacted through that address. I realize that if the evidence supports the conviction, the fact that to fill a crying need for men he was entering upon a most dangerous service for his country would not save him. But the service he was offering to do and the crying need he was filling, according to the undisputed testimony of Merrell, along with the balance of the evidence furnishes the guide by which to determine whether he was willfully evading a duty or was doing the best he could to keep the board informed of his address while serving his country.

> "And here is the place to pay a tribute to our Merchant Marine. Officially this is not one of our fighting forces, but I doubt if there is a more dangerous service. The merchant seaman risks bombs, torpedoes, mines, machine gunning, in addition to the usual perils of the sea, and often faces death in a form more terrible than any known on the battle field. He wears no fancy uniform, no bands play for him, or nobody calls him a hero—I heard of one man who had been torpedoed six times—yet back they go over and over again to their ship."[2]

In my opinion, the prosecution and conviction by which this defendant, while voluntarily serving his country on a most dangerous mission, was stigmatized, sentenced to jail, and in effect marked as a fugitive from duty, was wholly unwarranted and unjust. The judgment of conviction should be

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[2] Britain at War, J. B. Priestley, Harper & Bro.

reversed and the indictment dismissed. I dissent from the affirmance of the judgment.

A True copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 762

HOMER LESTER BARTCHY, ALIAS HOMER BROOKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 235–237)* and dissenting (R. 238–244) opinions in the circuit court of appeals are not yet reported. The district court's memorandum opinion overruling petitioner's demurrer to the indictment and setting forth the court's findings upon the evidence appears at pages 13–16 of the record.

*The record references are to the typewritten transcript on file with the Clerk. Petitioner has moved to dispense with the printing of the record, and although his motion has not yet been acted upon, the record has not been printed.

JURISDICTION

The judgment of the circuit court of appeals was entered December 23, 1942 (R. 245), and a petition for rehearing was denied January 26, 1943 (R. 252). The petition for a writ of certiorari was filed February 24, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED[1]

1. Whether the finding and judgment of the district court that petitioner knowingly failed and neglected to keep his local draft board advised of the address where mail would reach him, in violation of Section 11 of the Selective Training and Service Act of 1940 and Section 641.3 of the Selective Service Regulations (2d ed.), is supported by the evidence.

2. Whether a violation of Section 641.3 constitutes a punishable offense under Section 11 of the Act.

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[1] The general allegations that the indictment is insufficient and indefinite (Pet. 10, 11), without indicating in what respects, do not raise any specific question or present any issues which would warrant the granting of the writ. As against the charge of indefiniteness, it is significant that petitioner did not request a bill of particulars and that the record as a whole demonstrates that he was fully aware of the offense with which he was charged.

3. Whether petitioner had a right to "purge" himself of his delinquency.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885, 894, 50 U. S. C. 311, and of the Selective Service Regulations are set forth in the Appendix, *infra*, pp. 16–20.

STATEMENT

Petitioner, a registrant under the Selective Training and Service Act of 1940, was indicted on March 16, 1942, in the District Court for the Southern District of Texas on two counts charging, first, that he knowingly failed and neglected to comply with a notice ordering him to report for induction (R. 4–5), and, second, that he knowingly failed and neglected to keep his local draft board advised at all times of the address where mail would reach him (R. 5–6). He pleaded not guilty and, at his request and with the approval of the court and the United States Attorney, was tried by the court without a jury (R. 10–11). On April 18, 1942, the court found petitioner not guilty on count one but guilty on count two, and sentenced him to imprisonment in an institution

of the jail type for sixty days (R. 12).[2] He was admitted to bail pending appeal (R. 20–21). The court below, with one judge dissenting, affirmed the conviction (R. 245).

The evidence in support of the conviction may be summarized thus:

Petitioner, who had been duly registered with the Harris County, Texas, Selective Service Board No. 9 (R. 28–41), was classified 1–A on January 20, 1942 (R. 41–42). He took his Army physical examination on February 3 (R. 43, 46–48). A day or two later he inquired of the clerk of the board how long it would be before he would be inducted, and was advised that 25 to 30 days customarily elapsed between the Army physical examination and induction (R. 52). At that time the board's records, pursuant to a letter from petitioner dated December 12, 1941, showed his address to be 7543 Harrisburg Boulevard, Houston, Texas (R. 49, 50).

On February 10, 1942, the board received a letter from petitioner dated the same day, in which he stated that "In accordance with your regulations I am notifying you that I have today shipped as a seaman aboard the SS Caliche." He also stated that he preferred service "in the merchant marine to any other branch of the service"

[2] Petitioner's statement (Pet. 1) that he was convicted of failure to report for induction is incorrect.

and asked that he be given a deferred classification as a seaman His letter concluded thus:

> In the event you do not consider my service as an active seaman deferable you may communicate with me at my new mailing address, 8045 Harrisburg Blvd., care National Maritime Union. The trip I am shipping on will not last more than two weeks and since I have not received from you yet either the final report on my physical examination or an order giving me the date of the induction and since I was told by your board that I would have from 25 to 30 days after my physical examination (most probably), I believe that in the event you decide to induct me into the Army that I shall be back in Houston before the effective date of the induction.
>
> Please send your decision to me at 8045 Harrisburg Blvd., Houston. (R. 54.)

Prior to this, petitioner had never been a seaman (R. 206), and he was not at the time a member of the National Maritime Union, although the union had issued him a "trip card" for the voyage (R. 132).

On the same date, February 10, the board received a telegram from petitioner in which he stated that he was aboard the *S. S. Pan Maine* (R. 55–57). This telegram was the last communication the board received from petitioner concerning his whereabouts (R. 83). As a matter of fact, however, petitioner sailed on the *S. S. Pan Rhode*

Island, which left Texas City, Texas, for New York City on February 11 (R. 191, 209, 210, 213).

On February 20 the board mailed to petitioner at 7543 Harrisburg Boulevard, Houston, Texas, a notice to report for induction on March 4 (R. 57-58, 61). The notice was mailed to this address rather than to the Houston office of the National Maritime Union, 8045 Harrisburg Boulevard, because the board did not consider that petitioner's letter of February 10 (*supra,* p. 4) constituted a notification of a change in address (R. 81).[3] Nevertheless, the notice reached the Houston office of the union on February 20 or 21 (R. 119, 127-129)[4] and, in accordance with instructions left there by petitioner (R. 123, 125, 142–143), was forwarded to the office of the union in New York

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[3] The clerk of the board testified that petitioner's letter was regarded as in the nature of a request for deferment rather than as a notification of change of address (R. 81, 82). He said that "As a rule, with a notice of change of address, we only accept those when he says to change my address to such and such a thing (R. 81.)"

[4] Petitioner's repeated assertion (Pet. 2, 6, 11, 12) that the notice of induction failed to reach him because the board mailed it to 7543 Harrisburg Boulevard rather than to No. 8045 is negated by the record. Wells, the union's dispatcher at the Houston office at No. 8045 (R. 117), testified that the notice was received at that address around the 20th of February (R. 129), which was the date on which it was mailed by the board (R. 57, 61). The failure of the board's clerk to mail it to the address given in petitioner's letter of February 10 was thus obviously of no consequence. Cf. *United States ex rel. Bergdoll* v. *Drum*, 107 F. (2d) 897 (C. C. A. 2), certiorari denied, 310 U. S. 648.

City (R. 119, 120). On March 12, the notice was returned to the board (R. 58, 61, 62).

Meanwhile, upon petitioner's failure to report for induction on March 4, the clerk of the board telephoned one Drake, a dispatcher at the Houston office of the union, and "made inquiry about Bartchy" (R. 63–64). Drake told the clerk that petitioner had shipped from Houston on the *Pan Rhode Island* and that petitioner had since then written to Drake, stating that he had quit that ship and was going to sail in the war zone (R. 64).[5] Drake referred the clerk to one Merrell of the New York office of the union for further information (R. 64). On March 7, the board wrote to Merrell, asking that he inform them "of the name of the vessel on which Mr. Bartchy shipped, its probable return date, and port on return to the United States" (R. 84, 87).[6]

On March 10, the board, pursuant to Section 642.1 (b) of the Selective Service Regulations (*infra*, p. 17), mailed a notice of delinquency, dated March 9, to petitioner at the Houston office of the union (R. 68–72),[7] stating that he was

[5] This was the first information the board had that petitioner had shipped on the *Pan Rhode Island* (R. 83).

[6] Merrell replied to the board's letter under date of March 12 (R. 88–89), one day after petitioner had been taken into custody (see p. 10, *infra*).

[7] This notice was mailed to the union's address as a result of the information which the board had obtained from Drake of the Houston office (see p. 6, *supra*), and not in consequence of petitioner's letter to the board of February 10 (R. 69, 80).

delinquent for failing to report for induction and ordering him to report to the board on or before March 16 (R. 72). The notice was received at the Houston office of the union about March 11 (R. 143), but was not forwarded because it was known that petitioner had in the meantime been taken into custody in New York (R. 143). (See p. 8, *infra.*) Petitioner returned to Houston on April 2 and received the notice about three days later (R. 198).

On the same day (March 9) that it executed the notice of delinquency, the board, on Form 279 provided for by Section 642.4 (b) of the Selective Service Regulations (*infra,* pp. 18–19), reported petitioner to the United States Attorney as delinquent for failure to report for induction on March 4 (R. 101–105). The board stated in its report that "The delinquent has been located by F. B. I., Houston, Texas, * * * March 9, 1942, at New York, New York" (R. 103). On March 11, after agents of the Federal Bureau of Investigation had inquired at the New York office of the union as to petitioner's whereabouts, petitioner appeared at the office and was taken into custody by the agents (R. 147–148, 170, 212).

In his own defense, petitioner testified that he instructed the Houston office of the union to forward his mail to the New York office (R. 198–199, 205). When he arrived at New York on February 20, he secured his discharge from the *Pan*

Rhode Island, because he found that the vessel was going to return to Houston before he could finish his business in New York (R. 191–192).[8] Also on February 20, petitioner went to the New York office of the union and inquired of Merrell, the union's port agent (R. 161), whether there was any mail for him; Merrell replied in the negative (R. 192). During the course of this conversation petitioner told Merrell that he was expecting a communication from his draft board concerning his request for deferment (R. 192). On February 25, having received no word from the board, petitioner took employment on the *American Packard,* which was docked at Hoboken, New Jersey in New York Harbor (R. 193–194). He knew that this ship was scheduled for a foreign voyage (R. 206, 214) and that it would not be likely to sail for at least two weeks (R. 197, 206). Petitioner remained aboard the *American Packard* practically all of the time between February 25 and March 11, the date he was taken into custody (R. 193, 207–208). During this period he did not receive any information that he had been sent a notice of induction (R. 199, 211). He did not notify the board or, so far as ap-

[8] Petitioner explained that he sailed on the *Pan Rhode Island* rather than the *Caliche* because he found at the last minute that the latter was going on a three months' voyage (R. 208–209). When he went aboard the *Pan Rhode Island*, he thought that it was the *Pan Maine* (R. 210).

pears, anyone else, including Merrell, that he was aboard the *American Packard,* or attempt to get in touch with Merrell during the two-weeks' period (R. 163, 168, 178–179, 181–182, 187, 203, 216).

Merrell, called as a witness for the defense (R. 161), testified that petitioner came to him after the *Pan Rhode Island* reached New York and stated that he expected to be inducted (R. 162) and that he wanted to be notified as soon as the induction notice reached the union office (R. 168, 177–178). When petitioner's induction papers reached the union office, Merrell checked the records and found that petitioner had signed aboard the *American Packard* several days previously and that that ship had been scheduled for a foreign voyage. Merrell assumed that the ship had sailed and, consequently, he sent the induction papers back to the Houston office of the union with a letter stating that petitioner had left on a vessel bound on a secret voyage which would last several months (R. 163, 166–167, 178–179, 181–182, 187). Merrell did not see petitioner from about February 25 until petitioner was taken into custody by agents of the Federal Bureau of Investigation on March 11 (R. 168, 187).

ARGUMENT

1. The Selective Service Regulations provide (2d ed., sec. 641.3, 6 F. R. 6851–6852 *infra*, p. 8) that it "shall be the duty of each registrant to keep

his local board advised at all times of the address where mail will reach him." Section 11 of the Selective Service and Training Act establishes criminal penalties for any person "who in any manner shall knowingly fail or neglect to perform any duty required of him under * * * rules or regulations made pursuant to this Act."

Petitioner contends that the proof was insufficient to support a conviction for violation of the above regulation. The evidence shows that petitioner knew he would receive a notice to report for induction in Houston, Texas, within twenty-five to thirty days after February 3, 1942 (R. 52, 189–190). On February 11th, he shipped as a seaman for New York (R. 191, 209–210, 213). On February 10th, he wrote the draft board (R. 54, 189, 202–203) giving a new address in Houston, and stating that he preferred to serve in the Merchant Marine rather than the Army (although he had never been a seaman before (R. 206)). He left with the Houston address a forwarding address in New York, the office of the National Maritime Union (R. 119, 199, 205). On arrival in New York on February 20th, he inquired of Merrell at the union office whether there was any mail for him (R. 176, 192), and stated that he was expecting a communication from his draft board (R. 192).

On February 25th, he took employment on the *American Packard* (R. 193–194), which he knew

was going on a foreign voyage (R. 197, 206, 214), and remained on that vessel in New York harbor for two weeks without notifying Merrell that he was there or that the vessel was remaining in port for two weeks (R. 168, 187, 193–194, 199, 207–208, 211). In the meantime, while he was on the *American Packard,* his notice to report for induction arrived at the New York union office, but was returned to Houston when it was learned that the petitioner was on the *American Packard,* since it was thought that the vessel had already sailed (R. 163, 166–167, 178–179, 181–182, 187).

If we assume that the giving of a forwarding address is sufficient compliance with the regulation, the issue as to the sufficiency of the evidence to support petitioner's conviction is reduced to the question whether and to what extent a person who relies on such an arrangement is under an obligation to keep in touch with the address to which the mail is to be forwarded. How often that address should be apprised of a person's whereabouts will vary with the circumstances.

In this connection it should be noted that the Selective Service Act cannot function successfully if registrants do not apprise their boards where they can be reached. As the trial court observed (R. 16), "The Act and Regulations thereunder require great diligence and promptness upon the part of registrants in complying with the Act, Regulations, and Orders of the Board, and par-

ticularly great diligence in keeping the Draft Board advised of his whereabouts as required by Regulation, Part 641.3."

Here petitioner knew that a notice to report for induction was likely to arrive any day, and yet he remained on the *American Packard* for two weeks during this crucial period without communicating his address either to Merrell or to the Board in Texas. That petitioner was not overly concerned with making certain that his notice would reach him is indicated by petitioner's prompt joining of the Merchant Marine when induction into the Army became imminent and his leaving Houston and taking employment on a vessel due to leave New York for a long foreign voyage during that period.

On this evidence it would seem that the tryer of the facts, who heard the testimony, could reasonably have come to the conclusion that petitioner had failed to conform to the standard of diligence required by the Regulation. It was for the trial court, sitting without, and therefore in place of, a jury, to draw the inferences from the facts, and its conclusions are to be accepted as reasonable if based upon the evidence.[9]

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[9] *Fraina* v. *United States*, 255 Fed. 28, 34–35 (C. C. A. 2); *Rendleman* v. *United States*, 38 F. (2d) 779, 780 (C. C. A. 9); cf. *Goldman* v. *United States*, 245 U. S. 474, 477; *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105.

2. In his dissenting opinion Judge Hutcheson took the position that a failure to comply with the first sentence of Section 641.3, *infra*, p. 16, was not a violation of Section 11 of the Selective Service Act. We think the language of the Regulation making it "the duty of each registrant to keep his local board advised" is inconsistent with such a view. Petitioner does not argue to the contrary in his petition.

3. Petitioner contends (Pet. 2, 7, 10, 11, 13, 14) that under the regulations he had a legal right to "purge" himself of his delinquency and that this right was denied to him.[10] It is clear, however, that the regulations upon which petitioner relies confer no such right.

Petitioner's argument is predicated upon Sections 642.1–642.5 of the Selective Service Regulations (*infra*, pp. 19–20). They merely describe the procedure which a board shall follow in cases

[10] The record does not support petitioner's assertion that he "presented himself for induction in order that he may stand purged of any alleged delinquency" (Pet. 2; cf. Pet. 11). Petitioner evidently has reference to the fact that he surrendered to agents of the Federal Bureau of Investigation in New York City after he had been notified that they were looking for him (R. 153–154, 212). Regulations 643.1 and 643.2 do provide, however, that any person convicted of violating the Selective Service Act or any Regulation thereunder shall at any time after conviction be eligible for parole, for military service, or for work of national importance under civilian direction. Such a parole may be granted by the Attorney General upon the recommendation of the Director of Selective Service.

where delinquency is suspected.[11] The procedure prescribed by the regulations for the reporting of violations to the United States Attorney does not constitute an element of the offense and the board has no power to absolve the registrant of the consequences of any offense committed.

CONCLUSION

Although the case is not altogether free from doubt, as Judge Hutcheson's opinion indicates, we believe that on the whole record the trial court was warranted in reaching the verdict it did on

[11] These sections provide that the local board shall mail a notice of delinquency to a registrant who it "has reason to believe * * * has become a delinquent" (Sec. 642.1 (a)) and that the board shall, after mailing the notice, wait five days before taking further action (Sec. 642.2 (a)). If the board does not hear from a *suspected* delinquent within five days, it shall take certain designated steps to locate him (Sec. 642.2 (b) (c) (d)). Section 642.3 provides that if the suspected delinquent is located as a result of the board's efforts, or if he reports voluntarily, the board shall carefully investigate the delinquency, and, if it concludes that he is innocent of any wrongful intent, it shall proceed with his case as if he were never suspected of being a delinquent. Section 642.4 provides that if the board is convinced that a delinquent "is not innocent of wrongful intent," or is unable to locate a *suspected* delinquent, it shall report him to the United States Attorney for prosecution. Section 642.5 governs the procedure of the board when a delinquent reported by it to the United States Attorney later offers to comply with the law, but it expressly provides that the decision "whether such a delinquent should be prosecuted * * * rests entirely with the United States district attorney."

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the facts, and in coming to the conclusion that the Regulation required, under the peculiar circumstances of this case, a larger display of diligence.

It is accordingly respectfully submitted that, the decision below being correct, and no conflict of decisions existing, certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
ROBERT S. ERDAHL,
W. V. T. JUSTIS,
Attorneys.

MARCH 1943.

APPENDIX

Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885, 894, 50 U. S. C. 311, as amended, provides in part as follows:

> * * * any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

The pertinent provisions of the Selective Service Regulations (2d ed.) are as follows:

> SEC. 641.3 *Communication by mail.* It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not. [6 F. R. 6851–6852.]
>
> SEC. 642.1. *Mailing notice of delinquency.* (a) When a local board has reason to believe that a nonregistrant under its jurisdiction is a delinquent or that a regis-

trant under its jurisdiction has become a delinquent, the board shall prepare, in quadruplicate, a Notice of Delinquency (Form 281).

(b) The local board shall mail the original of the Notice of Delinquency (Form 281) to the suspected delinquent at his last-known address. It shall mail a copy to the State Director of Selective Service. It shall post a copy in a conspicuous place for public inspection, and, whenever practicable, it shall give the information contained thereon to the press and radio and shall encourage them to give such information the widest possible publicity. It shall file the fourth copy with the date of mailing noted thereon.

(c) If the suspected delinquent is a registrant under the jurisdiction of the local board, the local board shall note in the "Remarks" column of the Classification Record (Form 100) the fact that the notice was mailed and file the fourth copy of the Notice of Delinquency (Form 281) in the registrant's Cover Sheet (Form 53). [7 F. R. 110.]

SEC. 642.2 *Investigation of delinquency.*

(a) After mailing the Notice of Delinquency (Form 281), the local board shall wait 5 days before taking further action.

(b) If it does not hear from the suspected delinquent during the 5-day period, the local board shall take the following steps:

(1) Communicate with the person "who will always know" the registrant's address whose name and address appear on lines 7 and 8 of the Registration Card (Form 1).

(2) Communicate with the "employer" whose name and address appear on lines 10 and 11 of the Registration Card (Form 1).

(c) If as a result of these contacts the local board acquires any information which will enable it, with a reasonable amount of effort, to locate the suspected delinquent, it should make that effort.

(d) In trying to locate the suspected delinquent the local board may use the voluntary assistance of local or State police officials, as well as the press and radio. In no event, however, will the local board order or participate in the arrest of a suspected delinquent. [7 F. R. 110.]

SEC. 642.3 *Disposition of delinquencies.* If a suspected delinquent has been located as a result of the local board's efforts under § 642.2 or a suspected delinquent has reported voluntarily to a local board, the local board shall carefully investigate the delinquency. If the board finds that the suspected delinquent is innocent of any wrongful intent, the local board shall proceed to consider his case just as if he were never suspected of being a delinquent. The local board shall report its decision to the State Director of Selective Service and shall note its decision in its records. [7 F. R. 111.]

SEC. 642.4 *Reporting delinquents to United States district attorney.* (a) If the local board is convinced that a delinquent is not innocent of wrongful intent or if it is unable to locate a suspected delinquent (§ 642.2), the local board shall report him to a United States district attorney for prosection under section 11 of the Selective Training and Service Act of 1940, as amended.

(b) In reporting a delinquent to a United States district attorney, the local board shall fill out a Report of Delinquents to United States District Attorney (Form 279), in quadruplicate. The local board shall mail the original to the United States district attorney. It shall mail a copy to the State Director of Selective Service. It shall post a copy in a conspicuous place for public inspection, and, whenever practicable, it shall give the information contained thereon to the press and radio and shall encourage them to give such information the widest possible publicity. It shall note the date of mailing on the fourth copy and shall place it in the registrant's cover sheet (Form 53), if the delinquent is a registrant, or in an alphabetical file of nonregistrant delinquents, if the delinquent is not a registrant.

(c) If the delinquent is a registrant, the local board shall note its action in the "Remarks column of the Classification Record (Form 100). [7 F. R. 111.]

SEC. 642.5 *Local board action subsequent to reporting a delinquent to United States district attorney.* When a delinquent who has been reported to a United States district attorney later offers to comply with the law, the United States district attorney should be immediately notified and given a complete statement of the facts concerning such offer of compliance. The decision of whether such a delinquent should be prosecuted or his prosecution continued, in case it has already been undertaken, rests entirely with the United States district attorney. The local board,

when requested to do so by the United States district attorney, may offer a suggestion as to the advisability of discontinuing the prosecution of a delinquent who has complied or is willing to comply with the law. If it is determined that the delinquency is not wilful, or that substantial justice will result, the local board should encourage the delinquent to comply with his obligations under the law and, if he does so or offers to do so, should urge that any charge of delinquency against him or any prosecution of him for delinquency be dropped. [7 F. R. 111.]

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 762

HOMER LESTER BARTCHY, ALIAS HOMER BROOKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES *

OPINIONS BELOW

The majority (R. 4–6) [1] and dissenting (R. 6–12) opinions in the circuit court of appeals are not yet reported. The district court's memorandum of findings appears at R. 1–3.

* At the time this brief was sent for final printing petitioner's brief had not yet been received. We accordingly request the right to file a supplemental brief if it is found necessary upon receipt of petitioner's brief.

[1] This Court granted petitioner's motion to proceed on the typewritten transcript of record which was filed with the petition for a writ of certiorari and only the opinions of the courts below are contained in the printed portion of the record. The latter will be designated as "R" and the typewritten transcript as "Tr."

JURISDICTION

The judgment of the circuit court of appeals was entered December 23, 1942 (Tr. 245), and a petition for rehearing (Tr. 249–251) was denied January 26, 1943 (Tr. 252). The petition for a writ of certiorari was filed February 24, 1943, and was granted April 12, 1943. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the verdict that petitioner knowingly failed and neglected to keep his draft board advised of the address where mail would reach him.

2. Whether the knowing failure or neglect of a registrant to keep his local board advised of the address where mail will reach him, as required by Section 641.3 of the Selective Service Regulations, is an offense under Section 11 of the Selective Training and Service Act of 1940.

3. Whether the fact that the local board did not exhaust the procedures prescribed by the Selective Service Regulations for investigating delinquencies before reporting petitioner to the United States Attorney for failing to report for induction as ordered, operates as a bar to petitioner's

conviction for failure to keep the board advised of the address where mail would reach him.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885, 894, 50 U. S. C. 311, and of the Selective Service Regulations are set out in the Appendix, *infra*, pp. 38–42.

STATEMENT

Petitioner was indicted on March 16, 1942, in the District Court for the Southern District of Texas on two counts charging violations of Section 11 of the Selective Training and Service Act of 1940 (Appendix, *infra*, p. 38) (Tr. 4–6). The first count alleged that petitioner knowingly failed and neglected to report and submit to induction into the armed forces of the United States, as required by the order of the local board with which he was registered (Tr. 4–5). The second charged that he knowingly failed and neglected to keep the local board advised of the address where mail would reach him (Tr. 5–6). Petitioner's demurrer to the indictment (Tr. 7–9) was overruled (Tr. 14). He pleaded not guilty and, at his request and with the approval of the court and the United States Attorney, was tried by the court without a jury (Tr. 10, 11).

The evidence may be summarized as follows:

Petitioner was registered with the Harris

County, Texas, Selective Service Board No. 9 (Tr. 28–32). He filled out and returned his Selective Service questionnaire on May 12, 1941 (Tr. 32–40). On January 20, 1942, following a preliminary physical examination by the physician for the local board (Tr. 42, 43–44, 46–46c), petitioner was classified 1–A, available for general military service (Tr. 41, 42, 46). On February 3, 1942, he took his final physical examination, given by the Army (Tr. 42–43, 45–45a, 51). About the same time, in response to petitioner's inquiry of the clerk of the local board, petitioner was told that actual induction usually occurred from 25 to 30 days after the date of the Army physical examination (Tr. 52).[2] At the time of these events the address which petitioner had

[2] Under the procedure established by Part 629 of the Selective Service Regulations, 2d ed., which was promulgated January 15, 1942, and became effective February 1, 1942, the Army physical examination preceded the order to report for induction. 7 F. R. 274–276. This procedure was abolished by Amendment No. 45 of the Regulations, effective April 8, 1942, which deleted Part 629 in its entirety. 7 F. R. 2722. The effect of this latter amendment was to reestablish the procedure in force prior to February 1, 1942, whereby the registrant received his Army physical examination upon reporting for induction. See Paragraph 429 of the original Selective Service Regulations, promulgated October 22, 1940, and Part 633 of the Second Edition of the Regulations, which became effective February 1, 1942 (6 F. R. 6849); see also pages 39–40 of our brief in *Bowles* v. *United States*, No. 589. After January 1, 1942, the examinations made by local board examining physicians were only cursory and were designed to disclose such defects as would obviously disqualify the

given the board was 7543 Harrisburg Boulevard, Houston, Texas (Tr. 49, 50).[3]

Clyde M. Drake, the business agent of the National Maritime Union for the port of Houston (Tr. 138, 142–143, 144), testified that early in February 1942 petitioner applied for a job on a ship; petitioner told Drake that he had about 30 days before he would be called for induction and that "he would like to ship if it were possible" (Tr. 138–139).[4]

On February 10, 1942, the board received a letter from petitioner dated the same day informing the board that (Tr. 54):

> In accordance with your regulations I am notifying you that I have today shipped as a seaman aboard the S. S. Caliche.[5]

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registrant for military service. See Section 623.33 of the Regulations, 2d ed., 6 F. R. 6612–6613; see also Tr. 46c.

[3] By a letter dated December 12, 1941, petitioner had notified the Board to change his address from 7428 Sherman to 7543 Harrisburg Boulevard (Tr. 50). The clerk of the board testified that on numerous occasions prior to that date petitioner had changed his address with the board (Tr. 51). In response to questions by the court, petitioner stated that 7428 Sherman was his residence and 7543 Harrisburg Boulevard his "business office"; the latter, he testified, "seemed to me a more permanent mailing address than my residence" (Tr. 211).

[4] It is apparent that petitioner talked to Drake shortly after he had inquired of the clerk of the draft board as to when he would be inducted, for the clerk had told him that he could expect to be inducted in 25 to 30 days (see p. 4, *supra*).

[5] The letter was typewritten, but the name of the ship was written in in longhand.

I have asked the company and the office of the National Maritime Union 8045 Harrisburg Blvd. to also notify you.

I do not want you to in any way believe that I am seeking to safeguard my life from service on behalf of our country's fight against Hitlerism. On the contrary I am told that because of recent sinkings the casualty list among merchant seamen is as high or higher than in any other section of service.

However I prefer service in the merchant marine to any other branch of service because of the dependent which I have acquired recently—too recently to be recognized by your board—[6] and since the maritime commission and the federal government have appealed for young men to join the merchant marine to replace those being sunk and to man the new ships being

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[6] The dependent referred to apparently was petitioner's fiancee. In the form entitled "Report of Induction of Selective Service Man," of which the report of the Army physical examination is a part (Tr. 45–45a), petitioner listed one dependent, i. e., "Fiancee" (Tr. 45). In his Selective Service Questionnaire petitioner stated that he had no dependents (Tr. 37). On cross-examination petitioner testified that after he had been given his physical examination he wrote to his local board advising them that he was going to be married and that he was supporting his fiancee. He denied that he asked for deferment on this basis and stated that he merely requested the board to take these facts into consideration. He was informed, he said, that marriage after December 8, 1941, was not recognized as conferring a deferred status and he therefore withdrew the letter before the board had had an opportunity to consider it. (Tr. 218–219.)

built I have volunteered for this branch of our country's defense effort.

In the event that you do not consider my service as an active seaman deferable you may communicate with me at my new mailing address, 8045 Harrisburg Blvd. care National Maritime Union. The trip I am shipping on will not last more than two weeks, and since I have not received from you yet either the final report on my physical examination, or an order giving me the date of induction, and since I was told by your board that I would have from 25 to 30 days after my physical examination (most probably), I believe that in the event you decide to induct me into the army that I shall be back in Houston before the effective date of induction.

Please send your decision to me at 8045 Harrisburg Blvd. Houston.

On the same date, February 10, 1942, the board received a telegram from petitioner stating: "Correction on ship. I am now on S. S. *Pan Maine* owned by Pan American Oil Company" (Tr. 55–57). This telegram was the last communication the board received from petitioner concerning his whereabouts (Tr. 83). Petitioner in fact sailed on the S. S. *Pan Rhode Island,* which left Texas City, Texas, for New York City on February 11, 1942 (Tr. 123, 139, 191, 202, 209–210).[7]

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[7] Joseph L. Wells, the dispatcher at the Houston office of the National Maritime Union (Tr. 117) testified that petitioner had been assigned to the *Caliche* and petitioner later

Prior to this petitioner had never been a seaman (Tr. 206; see also Tr. 131–132, 135–136, 138–139). And although the National Maritime Union had issued him a "trip card" for the voyage on the *Pan Rhode Island,* he was not at the time a member of the union and was not eligible for membership until he had completed one voyage (Tr. 132–133; see also Tr. 151).[5]

On February 20, 1942, the board mailed to petitioner at 7543 Harrisburg Boulevard, Houston, Texas, a notice to report for induction on March 4 (Tr. 57–58, 59, 61). The clerk of the board testified that this was the address noted on the cover sheet of petitioner's file (Tr. 58) and that the board did not consider petitioner's letter of February 10 (*supra,* pp. 5–7) as a notification of change of address to 8045 Harrisburg Boulevard, but rather as a request that the board notify petitioner of their decision on his application for de-

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had asked to be transferred to another ship (Tr. 122–123, 125). Wells did not remember "exactly" why petitioner sought the transfer; he thought that petitioner had stated that the round trip on the *Caliche* would take too long, and said that petitioner told him "he had to be back in time * * * the draft board was in communication with him and that he had to let them know where he was or something like that" (Tr. 125). Petitioner testified that he had not sailed on the *Caliche* because at the last minute he found that it was going on a three months' voyage (Tr. 208–209). When he went aboard the *Pan Rhode Island,* he thought it was the *Pan Maine* (Tr. 210).

[5] Petitioner was a member in good standing at the time of the trial (Tr. 132).

ferred classification (Tr. 81–82).[9] Nevertheless, the notice reached the Houston office of the National Maritime Union at 8045 Harrisburg Boulevard on or about February 20, the date it was mailed by the board (Tr. 118–119, 120, 126, 127–129). Pursuant to instructions petitioner had left at the Houston office (Tr. 119–120, 123, 125, 126, 127, 142–143), the notice was immediately forwarded to the office of the union in New York City (Tr. 119–120, 125–126).[10] On March 12, the notice was returned to the board in an envelope which bore the return address of the New York office of the union but was post-marked Houston, Texas (Tr. 58–59, 61, 62; see also Tr. 140–141).

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[9] The clerk stated that "As a rule on a notice of change of address we only accept those when he says to change my address to such and such a thing" (Tr. 81). The clerk testified further that a request for occupational deferment is not accepted from the registrant but must be submitted by the employer on Form 42–A (Tr. 55, 82). Compare Regulations (2d ed.) 621.4, 622.21, 622.23, 626.2, 626.3.

[10] Wells, the dispatcher at the union's Houston office, whose duties included handling the mail (Tr. 117), testified that a communication from the board addressed to petitioner was received at the office about ten days after petitioner had left town, or about February 21, and that this was the only mail for petitioner that he had handled (Tr. 118–119). On cross-examination he admitted that he was guessing as to the date the communication was received and forwarded (Tr. 121–122). Later, however, in response to a question by the court, he stated positively that he received the communication and forwarded it (Tr. 126), and still later, on redirect examination, he explained that he fixed the date at ten days after petitioner had left Houston because he knew that the voyage to New York took from one to two weeks and he had cal-

Meanwhile, upon petitioner's failure to report for induction on March 4, the clerk of the local board telephoned Drake at the union's Houston office. Drake told the clerk that petitioner had shipped on the *Pan Rhode Island* and that Drake had since then had a card from petitioner stating that he had quit that ship and was to sail in the war zone; Drake referred the clerk to James

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culated at the time he received the communication that petitioner was then in the vicinity of New York (Tr. 127–129). Finally, he testified that to the best of his knowledge he received and forwarded the communication on February 20 (Tr. 129). Though Wells did not in his testimony identify the communication which he received and forwarded (see Tr. 119, 120), it is clear that it was petitioner's notice to report for induction, for Wells testified that it was a communication from the board, that it was the only one he had handled (Tr. 118), and that he received and forwarded it on or about February 20, the date the notice was mailed by the board (*supra*, p. 8). The inference is clear, therefore, that the notice was forwarded to the Houston office of the union by someone at 7543 Harrisburg Boulevard. These assumptions are further supported by the facts that the clerk of the board, in his testimony of the events leading up to the mailing of the notice, made no reference to any other communication to petitioner during this immediate period (see Tr. 51–64), that the induction notice was received at the union's New York office and returned to the Houston office (see pp. 14–15, *infra*), and was eventually returned to the board in a National Maritime Union envelope bearing a Houston postmark (see p. 9, *supra*). The original envelope in which the board mailed the notice was apparently discarded by the person at 7543 Harrisburg Boulevard who forwarded the notice to the union's Houston office, for Wells testified that he opened the envelope he received, that he would not have done so had it been addressed to petitioner, and that for this reason his recollection was that the envelope was addressed to the union (Tr. 119, 125–126).

Merrell of the union's New York office for additional information. (Tr. 64; see also Tr. 139–140, 141.) [11] On March 7, the clerk wrote to Merrell, asking that he inform the board "of the name of the vessel on which Mr. Bartchy shipped, its probable return date and port on return to the United States," and stating that this information was "essential inasmuch as we are trying to contact this party in order that induction notice may reach him" (Tr. 86, 87).

On March 10, the board mailed a notice of suspected delinquency,[12] dated March 9, to petitioner at the Houston office of the union, stating that according to information in possession of the board petitioner had failed to perform his duty to report for induction on March 4, and directing petitioner to report to the board on or before March 16 (Tr. 68–72).[13] On the same day (March

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[11] This was the first time that the board learned that petitioner had shipped on the *Pan Rhode Island* (Tr. 83–84).

[12] See Selective Service Regulations, Section 642.1 (a) and (b), Appendix, *infra*, pp. 38–39.

[13] This notice was mailed to the union's address rather than to 7543 Harrisburg Boulevard because Drake had advised the clerk of the board on March 4 that communications for petitioner could be sent through either the Houston or New York office of the union (Tr. 80; see also Tr. 69, 82). Drake testified on cross-examination by petitioner's counsel that a communication from the board addressed to petitioner at the union's address was received there on March 10 or 11, but was not forwarded to the union's New York office because Drake had read in the newspaper that petitioner had been taken into custody in New York; Drake had also heard that petitioner was returning to Houston. Drake therefore held the

9) that it executed the notice of suspected delinquency, the board, on Form 279 provided for by Section 642.4 (b) of the Selective Service Regulations (Appendix, *infra*, pp. 40–41), reported to the United States Attorney that petitioner was believed to have violated the Selective Training and Service Act of 1940 and the regulations thereunder in that he had failed to report for induction as ordered on March 4 "after advising this local board that he would return in time for induction" (Tr. 100–103). The board also stated in its report that "The delinquent has been located by F. B. I., Houston, Texas * * * 3 9 42, at New York, N. Y." (Tr. 103).[11]

In his own defense, petitioner testified that he desired to make the trip from Houston to New York in order to wind up his business affairs (Tr. 189–190), and that he instructed the Houston office of the union (8045 Harrisburg Boulevard) to forward his mail to the New York office (Tr. 198–199, 205). When he arrived at New York on February 20, he secured his discharge from the *Pan Rhode Island*, because he found that the vessel was going to sail on the return voyage before he could finish his business in New York

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communication and gave it to petitioner when the latter returned (Tr. 143–144; see also Tr. 198).

[11] On March 11, after agents of the Federal Bureau of Investigation had inquired at the New York office of the union as to petitioner's whereabouts, petitioner appeared at the office and was taken into custody by the agents (Tr. 147–148, 152, 168–170, 212).

(Tr. 191–192). Also on February 20, petitioner went to the New York office of the union and inquired of Merrell, the union's agent for the port (Tr. 161), whether there was any mail for him; Merrell replied in the negative (Tr. 192). Petitioner also told Merrell that he was expecting a communication from his draft board concerning his request for deferment (*ibid.*). On February 25, having received no notice from the board, petitioner took employment as a wiper on the *American Packard,* which was docked at Hoboken, New Jersey (Tr. 193–195). He knew at the time he applied for the job that this ship was scheduled for a foreign voyage (Tr. 197, 206, 214) and that it would not be likely to sail for at least two weeks (Tr. 197, 206). Petitioner remained aboard the *American Packard* almost all of the time between February 25 and March 11, the date on which he was taken into custody (Tr. 193–194, 207–208). During this period he did not receive any information that he had been sent a notice to report for induction (Tr. 199, 211–212). He did not, however, notify the board (Tr. 203, 216), or, so far as appears from the record, anyone else, including Merrell, that he was aboard the *American Packard,* nor did he attempt to communicate with Merrell during this period of two weeks (see Tr. 163, 166, 168, 178–179, 181–182, 187). Petitioner testified that he intended to sail with the ship unless before the sailing date he received a notice from the board denying his application for

deferment and ordering him to report for induction (Tr. 206–207).

Merrell, called as a witness for the defense (Tr. 161), testified that petitioner came to him upon the arrival of the *Pan Rhode Island* in New York and stated that he expected to be inducted but did not know how long it would be before he would be called; petitioner sought Merrell's advice as to how the union "handled that type of cases, of men who went to sea" (Tr. 162; see also Tr. 178). Merrell told petitioner that the union's "procedure working with the draft board has always been this, that where we have men that are going to sea, that we recommend and advise them to stay aboard ship * * * until the induction comes in, and then when the induction comes in, we always arrange, we always get hold of them ourselves for the draft board" (Tr. 162; see also Tr. 186). Petitioner asked Merrell to notify him as soon as the induction notice arrived (Tr. 168, 177, 178). When petitioner's induction papers reached the union office, Merrell checked the union's records and found that petitioner had signed aboard the *American Packard* several days previously and that the ship had been scheduled for a secret foreign voyage.[15] Merrell testified that the ships

[15] It is clear from Merrell's testimony, as well as from other evidence in the record, that Merrell did not know that petitioner had signed aboard the *American Packard* until after he had received petitioner's induction notice and had checked the union's records to ascertain what ship petitioner was on (Tr. 89, 152, 163, 167, 181, 183, 187).

usually remain in port three or four days (Tr. 167) and that inasmuch as several days had elapsed since petitioner signed on the *American Packard,* he assumed that the ship had already sailed; consequently, he returned the induction papers to the union's Houston office with a letter stating that petitioner had shipped from New York on a foreign voyage.[16] (Tr. 163, 164, 166, 167, 178–179, 181–182; see also Tr. 88–89.) Merrell also testified that because of the secrecy surrounding ship movements, it was difficult to communicate with persons aboard ships in New York harbor; he stated that it entailed "considerable trouble" to get through the docks (Tr. 166; see also Tr. 164) and that he had "to go through certain angles" to find out whether a ship was still in port (Tr. 169–170). Merrell did not see petitioner from about February 25 until petitioner was taken into custody by agents of the Federal Bureau of Investigation on March 11 (Tr. 168, 187).

At the close of the Government's case petitioner moved for a verdict of not guilty (Tr. 158–160). The motion was denied (Tr. 160) and was not re-

[16] Although Merrell testified that he did not open the envelope which he received and that he merely assumed that it contained petitioner's notice to report for induction (Tr. 166–167, 179–180), it is clear from the sequence of events that the envelope in fact contained the notice (see n. 10, pp. 9–10, *supra*). In his letter to Drake at the Houston office enclosing the papers he had received (Tr. 178–179), and in his letter of March 12 to the board (Tr. 88–89), Merrell referred to these papers as petitioner's "induction papers" and "the induction slip," respectively.

newed at the conclusion of all the evidence (see Tr. 220). The trial judge found (R. 1–3) petitioner not guilty on the charge of failing to report for induction, as alleged in count 1 of the indictment, "for the reason that the evidence is not sufficient to support a finding that he had either notice or knowledge of the Order of the Draft Board directing him to report" (R. 2). In respect of the charge of count 2 that petitioner had failed and neglected to keep the board advised of the address where mail would reach him, the court found petitioner guilty (R. 2–3) and sentenced him to imprisonment for sixty days (Tr. 12). Petitioner was admitted to bail pending appeal (Tr. 20–22). The court below, Judge Hutcheson dissenting, affirmed (R. 4–12).

SUMMARY OF ARGUMENT

I

The evidence is sufficient to support the trial judge's express findings, which were sustained by the circuit court of appeals, that petitioner failed and neglected to conform to the standard of reasonable care required of him in keeping the local board advised of the address where mail would reach him, and that he deliberately sought to avoid his duty in that respect. The evidence shows that although he had never been a seaman before, petitioner suddenly decided to join the merchant marine when his induction into the armed forces became imminent. On February 11, 1942, approximately one week after he had

been advised that he would in all probability be inducted in the next 25 to 30 days, petitioner sailed for New York aboard the *Pan Rhode Island,* advising the board at the same time that he preferred service in the merchant marine and requesting that he be deferred as a seaman. Although he requested the board to communicate its decision to him at the Houston office of the National Maritime Union and instructed that office to forward his mail to the union's New York office, he did not advise the board that he was going to New York or give it an address in that city where mail would reach him. Nor did he, upon his arrival in New York on February 20 or at any time thereafter, communicate his whereabouts to the board. When petitioner signed on the *American Packard* in New York on February 25 he knew that the ship was scheduled for a foreign voyage, but that it would be in port for at least two weeks, and he also knew that he was likely to be inducted within the next three to eight days unless the board acted favorably upon his request for deferment. Yet petitioner stayed on the *American Packard* in the harbor during this crucial period without apprising the union's New York office, his last remaining contact with the board, that he was aboard the ship and that it would be in port for two weeks, with the result that when the union agent checked the union's records upon receipt of petitioner's induction notice and found that petitioner had signed on

the *American Packard* several days previously, he assumed that the ship had already sailed and, consequently, returned the notice to Houston. Petitioner's conduct throughout this period manifested a careless disregard of his duty at a time when it was of the highest importance that he keep the board accurately informed of his whereabouts.

Furthermore, petitioner's course of conduct warrants the inference that he deliberately attempted to prevent the delivery of his notice to report for induction. He avowedly preferred service in the merchant marine and his conduct in abruptly embracing this new calling and leaving behind a tenuous chain of communication, and his own admission that he had intended to ship aboard the *American Packard* unless he received a notice to report for induction before the ship sailed, plainly show that he designedly sought to forestall communication of the notice until after he had established a deferable status as a seaman.

II

The view cannot be maintained that Section 641.3 of the Selective Service Regulations does not impose an affirmative duty, a violation of which constitutes a punishable offense under Section 11 of the Selective Training and Service Act of 1940, but merely charges the registrant with notice of a communication mailed to the last ad-

dress reported by him. The Regulation in terms make it the duty of the registrant to keep his local board advised at all times of the address where mail will reach him, and Section 11 of the Act makes it an offense knowingly to fail or neglect to perform any duty required by the Regulations.

III

The procedures established by the Selective Service Regulations for the investigation by the local board of suspected delinquencies and the reporting of violations to the United States Attorney for prosecution neither confer a right upon the registrant to "purge" himself of delinquency nor constitute an element of the offense. The offense is complete under the statute when there has been a knowing failure or neglect to perform the required duty. Hence the failure of the local board to follow these procedures before reporting petitioner to the United States Attorney did not bar the prosecution. *United States* v. *Morgan*, 222 U. S. 274.

In any event, it was proper for the board to report petitioner to the United States Attorney as a delinquent without first making the investigation contemplated by the Regulations. Petitioner had failed to report for induction as ordered and upon the basis of information in its possession when it reported petitioner to the United States Attorney the board might reasonably have concluded that any delay would have permitted petitioner to ship

out on a vessel bound on a foreign voyage and thus to escape induction.

ARGUMENT

I

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING THAT PETITIONER KNOWINGLY FAILED TO COMPLY WITH REGULATION 641.3

Section 641.3 of the Selective Service Regulations (2d ed.) (Appendix, *infra*, p. 38) makes it "the duty of each registrant to keep his local board advised at all times of the address where mail will reach him," and Section 11 of the Selective Training and Service Act of 1940 makes it a criminal offense for any person to "in any manner * * * knowingly fail or neglect to perform any duty required of him under * * * rules or regulations made pursuant to" the Act. The facts upon which petitioner's conviction for violation of Section 641.3 rests are, as the court below said (R. 4), undisputed, and the issue of the sufficiency of the evidence to support the conviction depends largely upon an appraisal of petitioner's conduct in the light of the nature of the duty imposed upon him and the inferences to be drawn from his behavior during the crucial period when his induction into the armed forces was imminent. On this issue the trial judge, who was the trier of the facts, found that petitioner failed to show the diligence which is required by Section 641.3, in respect of keeping the board

apprised of his mailing address, but that, on the contrary, he had sought to avoid the duty imposed upon him by the regulation (R. 3). These findings were affirmed by the court below, which, like the district court, held that petitioner not only failed in the discharge of his duty but he also "affirmatively endeavored to avoid delivery" of the local board's communication (R. 5–6). These concurrent findings of the courts below are supported by substantial evidence.

The duty imposed upon a registrant by Section 641.3 of the Selective Service Regulations is by its terms affirmative and imperative; he is required to keep his local board advised at all times of the address where mail will reach him. Strict and diligent compliance with this requirement is a keystone of Selective Service administration. The mail is the medium by which the local boards communicate notices, orders, and decisions to registrants.[17] And the second sentence of Section 641.3 emphasizes the importance of the registrant's duty to keep his board advised of his whereabouts by providing that the mailing of a communication by the board to a registrant at the last address reported by him shall constitute notice of the contents of the communication whether or not he actually receives it (Appendix, *infra*, p. 38). The prompt and effective administration of the Selective Training and Service Act thus depends in large measure upon the main-

[17] See e. g. Regulations (2d ed.) 613.17, 621.1, 621.11, 623.31, 623.61, 626.12, 627.31, 627.32, 628.6, 633.1.

tenance of an efficient and expeditious means of communication by mail between the local boards and registrants.

In these circumstances, the propriety of the regulation is not open to question. It is stated in strong terms: The registrant is under a duty at all times to keep the board advised of the address where mail will reach him. The standard of care required of the registrant under this provision, is, at the very least, that he must keep the board advised of an address where it might fairly be expected that a mailed communication will expeditiously and with reasonable certainty reach him, except for a misadventure which he could not normally anticipate. Cf. *Hackfield & Co.* v. *United States*, 197 U. S. 442, 448–451.

A critical circumstance in this case rests upon the fact that the events in question occurred when petitioner knew with certainty that his notice to report for induction was imminent. By February 3, 1942, he had passed his preliminary physical examination, and he had taken his final Army physical examination. In addition, petitioner had explicit notice of the shortness of time, since on or about February 3 he was informed, in response to his personal inquiry, that he would in all probability be inducted within the next 25 to 30 days. He could, therefore, reasonably expect

his notice to arrive within about 15 or 20 days.[18] Despite this, petitioner decided to join the merchant marine and, on February 10, he advised the board by letter that he had shipped as a seaman. He requested that he be deferred for that reason and that the board communicate its decision to him at the Houston office of the National Maritime Union. He did not advise the board that his ship was bound for New York; he did not advise it of the proper name of the ship; he did not advise it that he could be reached by mail at the New York office of the union or any other address in that city. Instead, he requested the officials at the union's Houston office to forward his mail to the New York office. Upon his arrival in New York on February 20 he did not communicate with the board, but inquired of Merrell whether there was any mail for him and explained to Merrell that he was expecting a communication from the board.[19]

On February 25, petitioner signed on the *American Packard*. He knew that the ship was going

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[18] Regs. 633.1 (b) provides that the time specified for reporting shall be at least 10 days after the date the order to report for induction is mailed.

[19] According to petitioner's testimony, he told Merrell that he was expecting a decision on his request for deferment (Tr. 192). According to Merrell, petitioner said that he expected to be inducted and asked Merrell to notify him as soon as the induction notice arrived (Tr. 162, 168, 177, 178).

on a foreign voyage and he also knew that the ship would not sail for at least two weeks (Tr. 197, 206). At this date petitioner had reasonable cause to believe, from the information the clerk of the board had given him, that he was likely to be inducted within the next three to eight days unless the board acted favorably upon his request for deferment. He was charged with the duty of knowing, and he must have known, that his notice had, in all probability, been sent to him and should have arrived in New York. See note 18; Reg. 611.5 (b). Yet he remained on the ship in New York harbor for two weeks without notifying the board of his whereabouts. He made no inquiry of the New York union offices. Neither did he notify Merrell, upon whom he was ostensibly relying to render effectual his channel of communication with the board, of the name of the vessel upon which he had taken employment or where it was berthed, or that it was scheduled for a foreign voyage but would be in port for two weeks. Nor did he inquire of Merrell during the balance of the crucial period when induction was reasonably to be expected, or thereafter, whether any mail had arrived for him, although he must have known, as Merrell indicated in his testimony (Tr. 164, 166, 169–170), that it was difficult even for representatives of the union to contact persons aboard ships in the harbor or to ascertain the sailing dates of such ships. Instead, petitioner left it to Merrell to

find out what ship he was aboard, with the result that when Merrell checked the records upon the arrival of petitioner's notice to report for induction and found that petitioner had signed on the *American Packard* several days previously, Merrell said he assumed that the ship had already sailed and, consequently, returned the notice to the union's Houston office.

This is not a case, therefore, where a registrant leaves a forwarding address so that mail may reach him, and by some unforeseeable circumstance the chain of communication is broken. We do not suggest that a registrant must immobilize himself when he has reason to believe that he will shortly receive a notice. Nor need he in all circumstances notify the local board of every move he makes, or every address, even if he be away for only a day or two. But, especially as here where the registrant knows of the imminent arrival of the climactic notice that he report for induction, if he does find it necessary to leave a forwarding address, instead of notifying the local board directly of his new address (which, surely, petitioner could easily have done here), then he is plainly obligated to keep in close communication with the forwarding address. This, petitioner wholly failed to do. He neither notified the Houston union office that he was on the *American Packard* nor, still more culpable, did he keep in touch with the New York office to which he directed the Texas office to forward his mail.

Petitioner did not even notify Merrell that he was aboard the *American Packard* and that the ship was, throughout the critical period, berthed in New York harbor.

Petitioner cannot be relieved by an argument that Merrell was remiss in returning petitioner's induction notice without first making a thorough investigation to determine whether the *American Packard* was still in port.[20] Merrell checked the union's records and when he found that several days had elapsed since petitioner signed on the ship, he assumed, in the light of his knowledge and experience, that it had already sailed (Tr. 163, 164, 166, 167, 181–182; see also Tr. 89). It is true, as Merrell's testimony shows, that he could, with some additional effort, have discovered that the ship was still in port (Tr. 169–170). But Merrell's failure to make a more thorough check

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[20] Neither can petitioner be relieved by the fact that the notice was originally mailed by the clerk of the board to 7543 Harrisburg Boulevard in Houston rather than the union's office at 8045 Harrisburg Boulevard, the address which petitioner had given in his letter to the board of February 10. The notice reached the union's office on or about February 20, the date it was mailed by the board, and was immediately forwarded to the union's office in New York (see p. 9, *supra*). Plainly nothing hinges, therefore, upon the board's failure to send the notice to the new mailing address which petitioner supplied. Cf. *United States* v. *Powell*, 38 F. Supp. 183, 185 (D. N. J.); *United States ex rel. Bergdoll* v. *Drum*, 107 F. (2d) 897 (C. C. A. 2), certiorari denied, 310 U. S. 648; compare *Allen* v. *Timm*, 1 F. (2d) 155 (C. C. A. 7); *United States ex rel. Feld* v. *Bullard*, 290 Fed. 704 (C. C. A. 2); *Ex parte Goldstein*, 268 Fed. 431 (D. Mass.).

does not excuse petitioner. The duty rested upon petitioner to keep the board advised at all times of the address where mail would reach him and it was incumbent upon him to make certain that his channel of communication was kept open. It was petitioner's own neglect and failure to communicate with Merrell which led to the latter's mistaken assumption that the ship had already sailed when petitioner's induction notice arrived. And even if it be conceded that Merrell did not exercise such care as the situation warranted or demanded, this would not excuse petitioner's neglect of duty; since petitioner had himself selected Merrell as one of the links in his chain of communication, unknown to the Board, he must on the facts here presented be held accountable for the omission of his agent which resulted in the failure of the board's notice to reach him. A registrant does not fulfill his obligations by choosing his own agent and then shifting an unreasonably heavy burden to him. Yet this was what petitioner did. He left it to Merrell to discover where he was. And he knew, or could have found out, that, as Merrell testified, it was difficult for Merrell to communicate with persons aboard ship and it entailed "considerable trouble" to get through the docks (Tr. 166, 169–170; see also Tr. 164).

But apart from this evidence of petitioner's wilful omission, which alone supports the conclusion that petitioner failed to discharge the obliga-

tion placed upon him by Sec. 641.3, the record also clearly supports the inference, as the court below found (R. 3, 5–6), that petitioner affirmatively sought to avoid his duty. The sequence of events, as well as his own testimony, establish acts of commission as well as omission.

Petitioner's pursuit of a seaman's occupation was coincident with the imminence of his induction. Until on or about February 3, 1942, petitioner's occupation had been secretary of a political organization (Tr. 35, 36, 190). Simultaneously with his receipt of information that he would in all probability be inducted in less than a month, he suddenly altered his way of life and decided to become a merchant seaman. He frankly stated he preferred this branch of the service, and he requested a deferment on that basis (Tr. 54). Then, although he told the draft board in his letter of February 10 that his voyage would not last more than two weeks, and that he would, if his request for deferment were denied, return to Houston "before the effective date of induction" (Tr. 54), he secured his discharge from the *Pan Rhode Island* upon its arrival in New York on February 20 *when he learned that it was scheduled to return to Houston shortly.* On February 25, petitioner signed on the *American Packard.* Merrell testified that petitioner told him that "if he stayed ashore he had no money to live on" (Tr. 165). This means, then, that petitioner had no money for transportation back to Houston even if he

received the notice, although he had just signed off the ship which would have brought him back to Houston in time. Moreover, he signed on the *American Packard* in the knowledge that it was to sail on a foreign voyage, and with the admitted intention of sailing unless he received a notice to report before the sailing date (Tr. 206–207).

On the whole record, therefore, there is plain support for the conclusion of the trier of the facts that petitioner attempted to escape service in the Army and, instead, to serve his country in the merchant marine, and that, to achieve this objective, he set out to forestall communication of his induction notice to him until after he had established his status as a seaman. That, indeed, the calling of a merchant seaman is vital, heroic, and dangerous, as Judge Hutcheson observed (R. 11–12), perhaps subjecting petitioner to greater physical risk than he would have faced in the Army, shows that petitioner was courageous and did not fear danger. Further, we may assume that it shows petitioner was eager to be of service to his country. But it cannot affect the result, for it was hardly for petitioner, in his relation to the draft here disclosed to choose his own battleground, as he sought to do. The orderly process of selection and training precludes each registrant from such last-minute choice of his own concerning how best he may serve the country.

II

A VIOLATION OF THE DUTY IMPOSED UPON A REGISTRANT BY SECTION 641.3 IS AN OFFENSE UNDER SECTION 11 OF THE ACT

Petitioner urges that it is not an offense under the Act for a registrant knowingly to fail or neglect to keep his board advised of the address where mail will reach him, as required by Section 641.3 of the Regulations. This section provides that—

> It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not.

Section 11 of the Act, in turn, makes it an offense for "any person * * * knowingly [to] fail or neglect to perform *any duty* required of him under * * * rules or regulations made pursuant to" the Act (italics supplied).

The pattern, therefore, is simple and unambiguous. Section 641.3 imposes upon the registrant *the duty* of keeping the board advised; Section 11 makes knowing [21] failure to perform any such duty

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[21] The term "knowingly," as used in Section 11 of the Selective Training and Service Act (Appendix, *infra*, p. 38)

a criminal offense. But the plain conclusion that Section 11 thereby makes a crime of knowing failure to fulfill the obligation imposed by Section 641.3 of keeping the draft board advised, is sought to be avoided by the suggestion that Section 641.3 imposes no duty at all, but rather by virtue of the second sentence of the section providing that any order to a registrant at the address given shall constitute notice of its contents, whether or not received), simply places a registrant at an absolute risk of knowing, and obeying, all notices or orders, whether or not received (cf. R. 9–11). Thus, it is suggested that the effect of the regulation would have been to make a registrant criminally liable under Section 11 even if through mere uncontrollable mischance, he never received the notice, as long as the notice is sent to the address which he gave.

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means, we believe, in connection with the mental element of the offense, no more than an awareness or knowledge of the facts which constitute the refusal to perform the required duty, or failure to conform to a reasonable standard of care with respect to that duty. Cf. *Reynolds* v. *United States*, 98 U. S. 145; *Ellis* v. *United States*, 206 U. S. 246, 257; *United States* v. *Crimmins*, 123 F. (2d) 271 (C. C. A. 2). It is not necessary that there be, in addition, knowledge or belief that the law has been transgressed. Cf. *Horning* v. *District of Columbia*, 254 U. S. 135, 137; *Ellis* v. *United States*, *supra*. But in any event, we submit that deliberate violation has been shown here even under a narrower use of the word "knowingly" (*supra*, pp. 27–29).

This view is untenable. It robs the carefully chosen words of the first sentence of Section 641.3 of their plain meaning by wholly disregarding its express imposition of a *duty* upon registrants. And, indeed, it would appear to leave the section utterly without sanction. For, contrary to the suggestion that absolute criminal liability would be placed upon a registrant who failed to receive a notice, irrespective of fault, Section 11 makes criminal only *knowing* failure or neglect to perform required duties. A registrant who, entirely innocent of fault, does not receive a notice to report for induction, has not committed a crime under Section 11 by failing to respond to a notice which he never saw.

A contrary interpretation is not only inconsistent with normal rules of criminal justice but is irreconcilable with the purposes of the Selective Training and Service Act. The Act is designed to raise an Army effectively and expeditiously. That purpose is served by placing a duty of high diligence upon registrants in keeping their draft boards advised of where they may be reached, and imposing criminal sanctions upon knowing failure to fulfill the duty, in order that such failures be discouraged. The purpose of the Act is not served by putting a registrant in jail for having violated no duty, and for failing to respond to an order which he never received and which, for aught that appears, the registrant is wholly willing to obey.

III

AN INVESTIGATION BY THE LOCAL BOARD OF PETITIONER'S DELINQUENCY WAS NOT A CONDITION PRECEDENT TO THE PROSECUTION

Petitioner contends that he had a legal right under the Selective Service Regulations to "purge" himself of his delinquency and that since this right was denied to him, the instant prosecution was foreclosed.

Petitioner's argument is predicated upon Sections 642.1–642.5 of the Selective Service Regulations (Appendix, *infra*, pp. 38–42). These sections provide that the local board shall mail a notice of delinquency to a registrant who it "has reason to believe * * * is a delinquent" (Sec. 642.1 (a)) and that the board shall, after mailing the notice, wait five days before taking further action (Sec. 642.2 (a)). If the board does not hear from a suspected delinquent within five days, it shall take certain designated steps to locate him (Sec. 642.2 (b) (c) (d)). Section 642.3 provides that if the suspected delinquent is located as a result of the board's efforts, or if he reports voluntarily, the board shall carefully investigate the delinquency, and, if it concludes that he is innocent of any wrongful intent, it shall proceed with his case as if he were never suspected of being a delinquent. Section 642.4 provides that if the board is convinced that a delinquent "is not innocent of wrongful intent," or is unable to

locate a suspected delinquent, it shall report him to the United States Attorney for prosecution. Section 642.5 governs the procedure of the board when a delinquent reported by it to the United States Attorney later offers to comply with the law, but it expressly provides that the decision "whether such a delinquent should be prosecuted * * * rests entirely with the United States district attorney."

In the instant case the board executed the notice of delinquency on March 9, 1942, and, without taking the intervening steps contemplated by the regulations, on the same day reported to the United States Attorney that petitioner had failed to report for induction on March 4 (*supra*, pp. 11–12). The gist of petitioner's argument is that by this action the board cut off a right conferred by the regulations to attempt to purge himself of his delinquency.[23]

It is clear, however, that these regulations are merely directory to the board and confer no right upon a registrant to purge himself of delinquency. Cf. *United States ex rel. Young* v. *Lehman*, 265 Fed. 852 (D. Md.). Initially, it is for

[23] Though this contention seems more appropriately addressed to the charge of failure to report for induction, as to which petitioner was acquitted, it is also open to him on the charge of failing to keep the board advised of the address where mail will reach him; Section 601.5 of the Regulations defines a delinquent as any registrant who fails to perform a duty required of him without having a valid reason therefor.

the board to determine whether a suspected delinquent has intentionally violated his duty. If the board determines that the suspect is not innocent of wrongful intent, it must report him to the United States Attorney. Under the Act, however, the offense is complete if there has been a knowing failure or neglect to perform the required duty. The procedure prescribed by the regulations for the investigation of suspected violations and the reporting of delinquents to the United States Attorney is not jurisdictional and does not constitute an element of the offense. *United States* v. *Morgan*, 222 U. S. 274; *United States* v. *Buffalo Pharmacal Co.*, 131 F. (2d) 500 (C. C. A. 2), certiorari granted on another point, April 5, 1943, *sub nom. United States* v. *Dotterweich*, No. 717. The board has no power to absolve the registrant of the consequences of his offense and, indeed, if the board fails to report a violation which in the opinion of the United States Attorney should be prosecuted, its failure would leave untouched his power and duty to prosecute "all delinquents for crimes and offenses cognizable under the authority of the United States" (R. S. § 771, 28 U. S. C. 485). *United States* v. *Morgan*, *supra*, at 281.

Nor was it improper, in the circumstances of this case, for the board promptly to report petitioner to the United States Attorney as a delinquent. Petitioner had failed to report for induc-

tion as ordered on March 4, 1942, although he had advised the board in his letter of February 10 that he would be back in Houston in time for induction. Upon making inquiry of Drake at the union's Houston office, the board learned that petitioner had sailed on the *Pan Rhode Island* and that Drake had since then had information that petitioner had quit that ship and was going to sail in the war zone. Drake referred the board to Merrell of the union's New York office for further information and on March 7 the board wrote to Merrell for information as to the vessel on which petitioner had shipped and the date and port of its return. On March 9, as appears from the board's report to the United States Attorney (Tr. 102–103), it obtained information that petitioner had been located in New York that day, and it thereupon executed the notice of delinquency and simultaneously reported petitioner to the United States Attorney. (See pp. 10–12, *supra.*) Upon the information it had, the board's action in immediately reporting petitioner was appropriate, for it had reason to believe that petitioner was still in the country and it could justifiably have concluded that any delay would have permitted petitioner to ship out on a vessel bound on a foreign voyage and thus to escape induction. Cf. *Seele* v. *United States,* decided February 23, 1943 (C. C. A. 8).

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court below has the requisite factual support, is in all respects valid, and should be affirmed.

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MAY 1943.

APPENDIX

Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885, 894, 50 U. S. C. 311, as amended, provides in part as follows:

> * * * any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

The pertinent provisions of the Selective Service Regulations (2d ed.) are as follows:

> SEC. 641.3 *Communication by mail.* It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not. [6 F. R. 6851-6852.]
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> SEC. 642.1 *Mailing notice of delinquency.* (a) When a local board has reason to believe that a nonregistrant under its jurisdiction is a delinquent or that a registrant under its jurisdiction has become a

delinquent, the board shall prepare, in quadruplicate, a Notice of Delinquency (Form 281).

(b) The local board shall mail the original of the Notice of Delinquency (Form 281) to the suspected delinquent at his last-known address. It shall mail a copy to the State Director of Selective Service. It shall post a copy in a conspicuous place for public inspection, and, whenever practicable, it shall give the information contained thereon to the press and radio and shall encourage them to give such information the widest possible publicity. It shall file the fourth copy with the date of mailing noted thereon.

(c) If the suspected delinquent is a registrant under the jurisdiction of the local board, the local board shall note in the "Remarks" column of the Classification Record (Form 100) the fact that the notice was mailed and file the fourth copy of the Notice of Delinquency (Form 281) in the registrant's Cover Sheet (Form 53). [7 F. R. 110.]

SEC. 642.2 *Investigation of delinquency.*

(a) After mailing the Notice of Delinquency (Form 281), the local board shall wait 5 days before taking further action.

(b) If it does not hear from the suspected delinquent during the 5-day period, the local board shall take the following steps:

(1) Communicate with the person "who will always know" the registrant's address whose name and address appear on lines 7 and 8 of the Registration Card (Form 1).

(2) Communicate with the "employer" whose name and address appear on lines 10 and 11 of the Registration Card (Form 1).

(c) If as a result of these contacts the local board acquires any information which will enable it, with a reasonable amount of effort, to locate the suspected delinquent, it should make that effort.

(d) In trying to locate the suspected delinquent the local board may use the voluntary assistance of local or State police officials, as well as the press and radio. In no event, however, will the local board order or participate in the arrest of a suspected delinquent. [7 F. R. 110.]

SEC. 642.3 *Disposition of delinquencies.* If a suspected delinquent has been located as a result of the local board's efforts under § 642.2 or a suspected delinquent has reported voluntarily to a local board, the local board shall carefully investigate the delinquency. If the board finds that the suspected delinquent is innocent of any wrongful intent, the local board shall proceed to consider his case just as if he were never suspected of being a delinquent. The local board shall report its decision to the State Director of Selective Service and shall note its decision in its records. [7 F. R. 111.]

SEC. 642.4 *Reporting delinquents to United States district attorney.* (a) If the local board is convinced that a delinquent is not innocent of wrongful intent or if it is unable to locate a suspected delinquent (§ 642.2), the local board shall report him to a United States district attorney for prosecution under section 11 of the Selective Training and Service Act of 1940, as amended.

(b) In reporting a delinquent to a United States district attorney, the local board shall fill out a Report of Delinquents to

United States District Attorney (Form 279), in quadruplicate. The local board shall mail the original to the United States district attorney. It shall mail a copy to the State Director of Selective Service. It shall post a copy in a conspicuous place for public inspection, and, whenever practicable, it shall give the information contained thereon to the press and radio and shall encourage them to give such information the widest possible publicity. It shall note the date of mailing on the fourth copy and shall place it in the registrant's cover sheet (Form 53), if the delinquent is a registrant, or in an alphabetical file of nonregistrant delinquents, if the delinquent is not a registrant.

(*c*) If the delinquent is a registrant, the local board shall note its action in the "Remarks" column of the Classification Record (Form 100). [7 F. R. 111.]

SEC. 642.5 *Local board action subsequent to reporting a delinquent to United States district attorney.* When a delinquent who has been reported to a United States district attorney later offers to comply with the law, the United States district attorney should be immediately notified and given a complete statement of the facts concerning such offer of compliance. The decision of whether such a delinquent should be prosecuted or his prosecution continued, in case it has already been undertaken, rests entirely with the United States district attorney. The local board, when requested to do so by the United States district attorney, may offer a suggestion as to the advisability of discontinuing the prosecution of a delinquent who has complied or is willing to comply with the law. If it is determined

that the delinquency is not willful, or that substantial justice will result, the local board should encourage the delinquent to comply with his obligations under the law and, if he does so or offers to do so, should urge that any charge of delinquency against him or any prosecution of him for delinquency be dropped. [7 F. R. 111.]

U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPREME COURT OF THE UNITED STATES.

No. 762.—October Term, 1942.

Homer Lester Bartchy, alias Homer Brooks, Petitioner, *vs.* The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 7, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

This case presents the question of the sufficiency of the evidence to support petitioner's conviction under section 11 of the Selective Training and Service Act and the regulations made thereunder,[1] for a knowing failure to keep his local board[2] advised of the address where mail would reach petitioner, a registrant under the Act. A second count, on which petitioner was acquitted and which need not concern us further, charged a knowing failure to comply with an order to report for induction into the armed forces. Certiorari was granted because the conviction involved an interpretation of an important regulation under the Selective Service Act — U. S. —.

With the approval of both parties and the court, petitioner was tried by the court without a jury and on conviction was sentenced to imprisonment for sixty days. The Circuit Court of Appeals affirmed, one judge dissenting.

Petitioner was placed in class 1-A, available for general military service, by Local Board No. 9 in Houston, Texas. He had already been given a final physical examination by the army. On February 4, 1942, petitioner was advised by his board that his induction would probably take place in twenty or thirty days. He

[1] Sec. 11 punishes with a maximum of five years imprisonment and a fine of not more than $10,000 "any person . . . who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, ..." 54 Stat. 885, 894. The regulation involved provides: "Sec. 641.3 *Communication by mail.* It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not." 6 Fed. Reg. 6851-52.

[2] § 603, 6 Fed. Reg. 6827.

immediately sought employment as a merchant seaman for a short coastwise trip. Employment as messman was secured through the National Maritime Union which had active offices in Houston and in New York. The latter city was the port of destination of the ship *Pan Rhode Island* upon which petitioner first shipped. Bartchy secured a union permit card prior to the voyage and later became a regular member of the union. The *Pan Rhode Island* sailed from Texas City February 11th and petitioner received his certificate of discharge from her employment in New York February 20th.

On February 10th Bartchy advised the board by letter that he was shipping as a seaman on the *S. S. Caliche.* He corrected this name on the same day to the *S. S. Pan Maine.* No notice was given the board as to the ship upon which he actually sailed. In the letter he suggested deferment from induction into military service on the ground of employment in the merchant marine and requested that in case deferment was granted it be addressed to 8045 Harrisburg Boulevard, Houston. This was the office of the National Maritime Union and was different from his address, 754 Harrisburg Boulevard, previously given the board. Bartchy arranged with the Houston office of the union to forward his induction notice to the union's New York office.

On, or shortly after, February 20, 1942, a notice to report for induction on March 4 was mailed to petitioner. It arrived at the Houston office of the union promptly and was forwarded to its New York office pursuant to the instructions left by petitioner. The record does not show the exact time the letter reached New York. The notice was returned March 12th to the board by the union in an envelope bearing the union's New York return address and postmarked Houston, Texas, the same day. It was not delivered to petitioner although, as will later appear, he was in New York harbor at the time.

On arrival in New York about February 20th, petitioner talked with Merrell, an executive at that office of the union, and inquired for mail from his local board. None was there. On February 25th through the union he obtained a job on the *S. S. American Packard*, berthed at Hoboken, and was on board until March 11th. Sometime between February 20th, when the notice was mailed at Houston, and March 12th, when it was received by the local board at Houston, the letter was in Merrell's hands in New York at the union office. Bartchy was not advised by

Merrell of the receipt of the notice to report for induction. The Federal Bureau of Investigation first sought information from Merrell as to Bartchy's whereabouts on March 10th and 11th. Merrell thereupon informed Bartchy that he was sought after by the F. B. I. and he came into the union office on March 11th and was taken into custody.

Bartchy admitted that he knew that the *American Packard* was bound for a foreign port and that he was willing to make the trip unless the induction notice was received. The ship was not to sail immediately on February 25th and he was not required to sign articles for the trip; that would be requested of him just before sailing and after the examination of the seamen by the federal, particularly naval, representatives. He "had every reason to think" that before sailing date he would have word from the board. Asked what he would have done if he were requested to sign articles for the foreign voyage on March 10th, the day before the arrest, he said that he would have first communicated with the board. Pay and lodging were earned by Bartchy through his service on the *American Packard*. During his stay on board the *American Packard*, Bartchy did not return to New York union headquarters to inquire for mail.

Merrell testified that in their first conversation petitioner said that he was expecting an induction letter, that he wished immediately to be informed of its arrival and that he asked for advice "on how we handled that type of cases, of men who went to sea." Petitioner also said that he would like to work in the meantime and asked whether he should ship. Merrell told him to continue shipping until the time came to go into the army. The witness testified that his customary advice was for such men to stay aboard ship "until the induction comes in, and then when the induction comes in, we always arrange, we always get hold of them ourselves for the draft board." When the induction notice arrived in the New York office, it was routed to Merrell and he returned it to the board under the mistaken impression that the *American Packard* had left the harbor bound for a war zone.

As petitioner was acquitted of the charge of knowingly failing to report and submit to induction into the armed forces, we shall not deal of course with the situation of a registrant, so charged, who complied with the duty of keeping his local board advised of his address and failed nevertheless to receive his notice. This petitioner was convicted only of the charge that he knowingly

failed and neglected "to keep his local board advised at all time of the address where mail will reach him."

We think the Government correctly interprets the Act, Sectio 11, and the regulation, Section 641.3, not to require a registran who is expecting a notice of induction to remain at one place o to notify the local board of every move or every address, even i the address be temporary. The Government makes the poin however, that a registrant with knowledge, as here, of the imm nence of the posting of the notice "is plainly obligated to kee in close communication with the forwarding address." If th suggestion is meant as a rule of law that at his peril the registran must at short intervals inquire at his last address given to th board, here 7543 Harrisburg Boulevard, Houston, or at his ow forwarding address, here the Maritime Union in New York, w are of the view that the Government demands more than the regu lation requires. The regulation, it seems to us, is satisfied whe the registrant, in good faith, provides a chain of forwarding ad dresses by which mail, sent to the address which is furnished th board, may be by the registrant reasonably expected to come int his hands in time for compliance.

The District Court and the Court of Appeals concluded tha the petitioner had not shown diligence in keeping the board ad vised of his whereabouts and had affirmatively endeavored t avoid delivery of the communication. We do not think either o these inferences is justified by this record.

The petitioner left with the board an address which in regula course of mail should and did bring the notice to the harbor whe petitioner was located. The fact that Bartchy shipped on on ship rather than another to reach New York is immaterial. O arrival there he went to his forwarding address, inquired for mai told the official in charge he was expecting an induction notic and arranged for notification to him by the union of its arriva Bartchy failed to receive the notice because of the mistake of th official of the union when the latter concluded, without verifi tion, that the *S. S. American Packard* had sailed. The union ha information the registrant was working on that ship.

Petitioner might have been more diligent by telephoning o calling at the union at intervals between the twenty-fifth o February and the tenth of March but we conclude that he w justified in relying upon the efficiency of this experienced organ zation to advise him of the arrival of the notice.

Reversed.

Mr. Chief Justice STONE.

The decision of the two courts below that petitioner knowingly failed "to keep his Local Board advised at all times of the address where mail would reach him" is amply supported by uncontradicted evidence.

The address which petitioner gave the Board was that of the Maritime Union in Houston, Texas. Mail would not reach him there because he was not in Houston. Assuming that a forwarding address to a place where mail would reach him, if forwarded, would satisfy the statutory requirement, mail would not reach him at his forwarding address in ~~Brooklyn~~, New York for he was not in ~~Brooklyn~~ in the critical time from February 25 to March 11, during which he knew from the advice of the Board that his notice of induction would probably be mailed. He was then living in Hoboken, New Jersey on the *S. S. American Packard*, on which he had sought employment as a seaman for a voyage of many months to the Far East, and which, pending her sailing, was undergoing repairs in Hoboken.

During that time mail would not reach him in ~~Brooklyn~~ for he was at no time in ~~Brooklyn~~ and he at no time went or sent there for mail, or inquired whether mail had come for him. Mail would not reach him in Hoboken or on the *American Packard*, or "in New York Harbor", because he had not given either as a forwarding address or given instructions to any one that mail be sent or delivered to him at either place. The courts below were justified in concluding that during a period of some weeks, when he expected to receive the notice of the draft board, and when he was preparing to leave the country for a period of months, he knowingly failed to keep the Board advised of any address where mail would reach him. The judgment should be affirmed.

Mr. Justice ROBERTS joins in this dissent.